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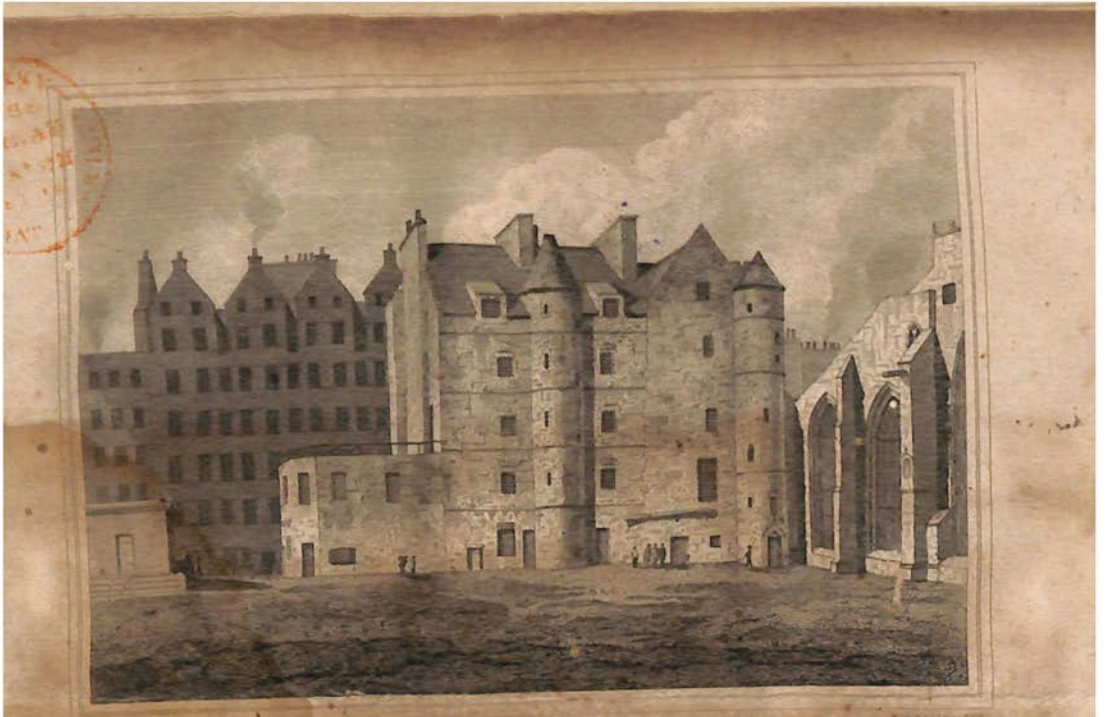

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CRIMINAL TRIALS,

ILLUSTRATIVE OF

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THE TALE ENTITLED

"The Heart of Mid-Lothian,"

PUBLISHED FROM THE ORIGINAL RECORD:

WITH

A PREFATORY NOTICE,

INCLUDING SOME PARTICULARS OF

THE LIFE OF

CAPTAIN JOHN PORTEOUS.

LIBRARY OF THE BOMBAY BRANCH OF THE ROYAL ASIATIC SOCIETY

——————"A thousand heads,
A thousand hands, ten thousand tongues and voices,
Employ'd at once in several acts of malice!
Old men not staid with age, virgins with shame,
Late wives with loss of husbands, mothers of children,
Losing all grief in joy of his sad fall,
Run quite transported with their cruelty!"

BEN JONSON.

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EDINBURGH:

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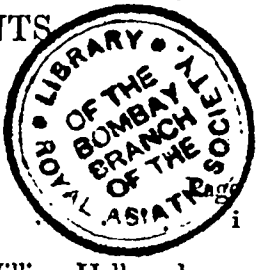

PREFATORY NOTICE, . . . i

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PREFACE,

INCLUDING SOME PARTICULARS

OF

THE LIFE OF

CAPTAIN JOHN PORTEOUS.

THE public curiosity being probably much excited, respecting all the circumstances which attended the murder of Captain Porteous, as well as the private history of the individual himself, it is deemed expedient to prefix to the following trial some extracts from a pamphlet, entitled, "*The Life and Death of Captain John Porteous,*" &c. written soon after his execution, when many anecdotes touching the unhappy man were in circulation, which are collected in the above mentioned tract, and, as far as we know, were never formally contradicted; yet are these memoranda to be received *cum grano salis*, for, at the time of their publication, party, that bane to truth, added unwonted virulence to the satire of a spiteful age; and a friend of Porteous, at least in the Gude Town, was re-

garded as a deadly foe to the metropolis itself, if not the inveterate enemy of his native country.

"John Porteous, (says his biographer,) one of the Captains of the City Guard of Edinburgh, was son to Stephen Porteous, a tailor in Canongate. The father had a fair character in his employment, and was esteemed a good honest man, in the whole conduct of his life; his greatest misfortune was to have such a son as John was. The father early discovered in the son a perverseness of nature, and a proneness to commit mischievous, and more than childish tricks. The mother, out of a blind affection to her child, took them all for growing proofs of his mettle, and as marks of an extraordinary and sprightly genius.

"Thus the family was divided upon the education of John. The mother could not endure to see the father bear hard on the faults of her child, and thought he did it more to gratify his passion, than to crush her son's budding vices; and was so weak, as to imagine the father was the severer upon her dear child, only because she loved him. This put her upon often excusing and concealing faults which he should have been severely chastised for, if they were resolved to have a wicked boy to grow up a better man.

"From this thwarting in their measures about the son, the father lost his authority, and, for the peace of his family, winked at faults which the good man saw his duty to correct. The loss of paternal authority begot want of filial regard to

the father, and this at last produced contempt; so that the boy, shooting up with these vicious habits and disregard of the father, advanced from reproaches and curses to blows, and laying violent hands on the parent, whenever the misfortunate man would not concur with the folly and madness of the rake.

"The mother saw, too late, what her misguided affection had brought them to, and how, to all her weak and over-fond love in his childhood, the man made the base return of abusive and threatening language, and the utmost disregard; for he proved too hard for them both at last, and her love to him begot hatred to her, as well as to the father, with bitter reflections on both sides. She told him one day, 'That she was positive he would be hanged.' He answered, 'The devil a one was to blame for it but the bitch that bare him, if it should be so.'

"He was of a middle size, broad shouldered, strong-limbed, short-necked, his face a little pitted with the small-pox, and round; his looks mild and gentle, his features having nothing of the fierce or brutal; his eyes languid, not quick and sprightly, and his complexion upon the brown. His outward appearance answered not his inside. He was insolent to his inferiors, easy and agreeable with his equals, humble and submissive to his superiors; he was cunning, and a great master of the arts of insinuating and gaining upon the young and unwary, and even upon those of better judgment and greater experience. When he had some design on

foot, he would then display his wit, and play off the agreeable in conversation. He was quick in discerning his man, and his foible, and knew very well what would take with him and his company. He could cover, upon occasions, an unsupportable pride, a readiness to fly into anger like a sudden fit of madness, with a seeming modesty and command of his passions; but when he let himself loose, and threw off the mask, one would have thought he was animated with an infernal demon. Religion, and the virtues, were as much strangers to his mind as the contempt of it, and the opposite vices were familiar. Pride, the passion of anger, cruelty, and revenge, seemed to have the ascendant over the other vices of his mind. He loved truth so little, that he could muster up as many falsehoods, to worry and destroy it, as he commanded soldiers in his guard, when it made for his purpose. His courage was often called in question, though his profession was ridiculous without it.

"He was no hypocrite, except on some occasions; he was generally at as much pains, among his comrades, to lay open his vices, as the other is to conceal them. He not only was vicious himself, but liked to make others so; since he could not have their friendship by true merit, he endeavoured to have it by that false one of pimping It was a pleasure to him to observe grudges among people, and, by secret whispers and false suggestions, he was sure

to keep them on foot, till their hatred was inflamed, or they were together by the ears, unless there was some particular friendship he either aimed at keeping up or procuring. In short, he was no better member of society, than he was a dutiful son, a loving husband, and a good officer, without one good quality to balance his many bad ones.

"The father having a good employment, would have John learn his trade of a tailor, both because it was easiest and cheapest for the father, and sure and good bread for the son, to set up either by himself, or to succeed the father after his death. But, as he grew up, his wickedness increased too, his judgment proving too weak for the bent of his nature. So unaccountable he turned out with time, that, when he was checked by his father in his vicious career, he almost put the good old man to death by kicks and blows.

"The father, stunned with this maltreatment, was divided in his thoughts, whether he should prosecute him according to law, and hang him for a miscreant, or rid himself of him by sending him off the country. At last, the resentment of the father prevailed over the particular resentment of the unnatural injury, and the justice he owed to the public, to have such a monster made an example; he sent him away to the army as a recruit, in Queen Anne's time, under the command of Brigadier Newton, where his cruelty might be lawfully vented, without the hazard of the gallows. After he had been some time in the army, he im-

proved in all the arts of mischief and wickedness, of which he shewed himself afterwards a great master.

"I mention an action of his while he was in Flanders, which, though of small moment, yet shewed the man. Passing by with some of his comrades, he saw a hen at a distance covering her chickens, at which he fires his fusee, and kills it. The poor woman to whom the hen belonged, alarmed with the shot, started out, and saw her hen killed. She followed, and asked of him the price of her hen and chickens, for both was lost to her, and that it was a great part of her living; but he, relentless at her loss, threw away with his comrades, absolutely refusing to give her any thing, and threatening, if she insisted, to send her after her hen. The old woman, with tears, prayed him then to let her have any thing, though never so small. But away he went, not moved with her tears, not hearkening to the pitiful complaints of the miserable woman. She sent after him a whole volley of sincere prayers and curses, with this particular one: 'That as many might gaze and wonder on him as that hen had feathers on her body.' This action, I think, carried in it a complication of crimes; and Heaven, in its own time, thought fit to answer the voice of the complainer.

"While he served in this corps, he was shrewdly suspected, though it was never proven, of having murdered his captain. He had received a beating from him; it stuck in his stomach; and he vowed

revenge in his heart. He laid his plot, viewed all the walls of the garrison, where he might make his escape the easiest; he contrived to have a secret message from another officer of the regiment, to be immediately imparted to the captain; the wicked man catches the advantage of his officer unarmed; and in bed, under the cloud of night, and fast asleep after a bottle, murders him; and, undiscovered, made his escape from the garrison, and got off for England, and then to London, where he lived unknown, and in a very poor condition, for near two years, though he had robbed the captain of all the money he could lay his hands on, nothing being found in the captain's pockets. The people of the house wondered the captain should sleep so long, and came to the door, but found it locked, for the villain had carried away the key; the door was broke open, and there was the captain lying, his throat cut, and stabbed to the heart.

"The murder was so secretly done, that there was nothing to prove it but the suspicion by Porteous's flight, and the centinel's declaration, that he had seen Porteous go in upon some important affair, as he said, to the captain, and, after some stay, saw him return.

"He had before coloured over the thing, which he had for some time meditated upon in the heart of him, among his comrades, telling them, That he was weary of the service, and would some time or other quit it, without one word of his grudge at the captain; on the contrary, he was, on all oc-

casions, full of his praises, and used to say, If he was to serve, it could not be under a better man. All this, when examined into, made it so doubtful, that it passed at last that the captain had murdered himself, the instrument of the murder being left in the bed.

« Which way he lived in London, you may readily guess. I understand, when he was hard pinched, and could find no other way of keeping soul and body together, he wrought as a journeyman tailor. He put on at this time many shapes; sometimes he appeared in fine clothes, and at other times he was all in rags. He was, in one revolution of a moon, a tailor, a bully in a bawdy-house, a street-walker, a gentleman, and a beggar. In this last plight, Baily the coachman in Canongate found him, and wrote to his father, at his request, to help him. The old man, moved with the compassion of a father, forgot all his past conduct, and sent him ten pounds sterling, to put him in clothes and linens; and Baily gave him, besides, thirty shillings, to help to defray his expences in the coach, upon his return home. But when he had got clothes on his back, and thirty shillings in his pocket, away he goes; and Baily saw him not again for twelve months after, when he was all in rags. Nothing is able to tame the wild. Baily brought him down to Edinburgh, putting him again in some tolerable habit, all out of regard to the honest man the father. When the son was presented by the coachman to him, the tender-

hearted father broke out into tears of joy, and embraced him with great love and paternal affection, mounted him from head to foot with better clothes, linens, and other things suitable. He gave over his employment to his son, and contracted with him, that he should have only a room in the house, and his meat and clothes, leaving nothing to himself but his scrimp maintenance.

"Porteous, thus possessed of the house and trade of the father, and of whatever else he had besides, began by degrees to maltreat his father; first, by denying the old man a fire in his room, in the time of frost and snow of the winter, and grudging him even the use of the kitchen fire. He added to this a scrimp diet, till the old man was like to be starved with hunger and cold, having no money to provide himself elsewhere, nor credit to support him another way. In this dismal condition he applied to be received into the Trinity Hospital of Edinburgh, a place set apart for both sexes in old age and poverty. The son stormed at this, and took it forsooth for a mighty affront, yet he forced the poor man into that hospital, by cruelly denying him the common comforts of life. Was the old man to be starved, to gratify the other's ridiculous pride? When the son saw the father in a fair way to be admitted there, he offered to maintain him better, but he knew the son's temper too well to depend upon him.

He was now one of the captains of the town-guard, and his pride rose with his promotion. I

must here give you an account how he came to that office. The lord provost, John Campbell, in the memorable 1715, resolving to have the city-guard well disciplined, for the support of the government and protection of the town, called John Porteous from his trade, to be drill-master of the guard. He executed his part very well in this office, and was often called to give an account how that body of men improved in the military discipline. This gave him access to make love to a gentlewoman, who had the care of the lord provost's house and family; he succeeded in his addresses, and they married. The lord provost, from a grateful return to the gentlewoman, for her care and good management of his family, and from a conviction of Porteous's sufficiency for that office, prevailed on the town council of the city to elect him one of the captains of the city-guard, with a view to make the married couple live the more comfortably together; and there was nothing to hinder it but his own perverseness. The gentlewoman was a person of virtue and merit, and still has a good character, whose nature was always as far removed from the light and wanton, as it is from the surly and morose, earning her bread now, partly by the diligent and honest product of the work of her hands, and beloved by all who converse with her, only unlucky in marrying John Porteous, who was no better husband than he had been a son. He often dragg'd her out of bed by the hair of her head, and beat her, to

the effusion of her blood. The whole neighbourhood were frequently alarmed, in the middle of the night, with her shrieks and hideous cries, to such a degree, that a lady living above them was obliged, in the middle of a term, to take lodging elsewhere, for her own quiet. He did things to her which I am ashamed to write, and you would blush to read. All this was done because she stood in the way of his adulterous embraces with her maids. They at last separated, and he had his wish, giving full swing to all his lustful passions. How badly he requitted this gentlewoman, who had been the occasion of his advancement, and the lord provost, for using his interest in the town council in his favours, you may see from this treatment of one who had for some years so discreetly managed his house. She often told him, he would be hanged; and it was no wonder, he having frequently threatened to cut her throat. *

"He was most unaccountable in his expressions. He used often to say among his comrades, 'That

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* About this time a namesake of the captain's actually hanged himself in a pet, after having beaten his helpmate. "29th March, 1736.—Last week George Porteous, smith at Edmistoun, having severely beat and abused his wife, thought himself so highly affronted by the neighbours *riding the stang for him*, that, taking remorse, he went and hanged himself the day after. What is most remarkable is, that his hands were tied behind his back, and a cloth upon his face." *Caledonian Mercury.*

if his wife was in heaven, he would hate to go thither.' Playing at golf once, and beat, 'He was sure (he said) there was no justice in heaven.' At another time, being engaged at whisk, and sent for by some of his comrades, he returned for answer, 'That if God Almighty would send for him, he would not then go.' These expressions are no better proofs of his religion than the treatment of his wife is of his good nature.*

"This command of his in the city-guard gave him great opportunities to lay open and display his nature, and to give full vent to all his ungovernable passions; seldom a day past but some one or other of his squad felt the weight of his stick. Discipline ought certainly to be kept up, yet there may be an excess in the execution of it. The other captains found not themselves under the same necessity of thrashing and beating; it was hard if he had the worst corps of the whole. A serjeant of his had once the misfortune to speak to him covered, upon which the captain gave him two severe pushes in the breast. The man, stunned with the first, stood the second, and dropped down; he was carried home, spit blood, languished, and died. I own it was a fault in the serjeant, not to give

* After sentence, it would appear that he became more religious; for, on the 8th of August, he was, at his own desire, prayed for in all the churches and meeting-houses in Edinburgh.

his superior officer due respect; but then it must be acknowledged, it was too severe a correction for such a fault. He is sadly belied, if some of the soldiers went not into the other world by his means, without so much time given them; the poor people had no friends that were able to bring him to justice, and the public either knew not of the facts, or winked at them, upon the account of discipline; and, no doubt, had he been publicly accused, there had been no small number to propagate his defences, as we may easily guess from what fell out afterwards.

"He abused the design of the City Guard. It is particularly, among other things, maintained in the city to beat down disorders both within and without doors: He executed this as partially as ever any did in that command. He had all the bawdy-houses at his command: He let out his authority less or more upon them as they were willing to gratify him:* And even private houses were out of the protection of the guard; when he or his intimates had a mind to attack any pretty girl

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* "*Edinburgh, February* 10, 1736.—Yesterday nine wenches of the town made an *amende honourable* through the several streets of this city, the hangman attending them, and drums beating to the tune of *Cuckolds come dig!* Seven of them were afterwards sent to the house of correction. They were very naked and meagre beings, and fools into the bargain, for driving a trade which afforded neither food nor raiment."—*Caledonian Mercury.*

in them, they had no more to do but to delay the attempt till he in his turn had the guard, then all was sure. The way he put most in practice, was to pretend to search for run goods, or concealed persons, and the soldiers secured the doors till he accomplished his designs. He sometimes made his escapades with guards, sometimes without them, always secure no assistance should come from the guard, whatever happened. This turn of mind, and the command he had, gave him great advantages to procure the acquaintance of the young folks, and afterwards their friendship, which he improved or slighted as he saw his own interest advanced by it. He lived much the same in Edinburgh a captain, as he had done in London a journeyman tailor, only with this difference, that he had here better clothes on his back, and was more uniform in his dress, had more money in his pocket, and his vicious inclinations were more successful, as they were better backed in the execution.

"The mob, on all public occasions, enlarged the sphere of his natural temper. You would have seen a plentiful crop of kicks, cuffs, blows, and strokes, to be reaped from his feet, fists, and cane. The mob, sure, is a great ungovernable beast too often, and is to be kept in order by fear; but then severities upon them should seem rather to be extorted, than a humour gratified, in grasping at every occasion to beat and thresh. Though they are bad judges in the most of things, when they descend into particulars, yet they seldom err about

injustice and oppression, when the persuasion is universal. On all solemn days there is a multitude from the country, as well as from the town, to observe shows and solemnities on royal birth days; these people were sure of a beating from him. The hatred and terror of him increased every year, and his character of a wicked debauchee was known to every body; so that he was universally hated and feared by the lower set of people in town and country. But when he had killed and wounded above sixteen persons in the Grassmarket, after Andrew Wilson's execution, their hatred rose into fury against him; with difficulty they were kept from falling upon him, and tearing him to pieces, before he was committed to prison. The grief and concern of the friends and relations of those whom he had murdered and wounded, came in to increase the flame against him. There was a rumour, indeed, that there would be a mob to rescue Andrew Wilson from the gallows, which made the Magistrates to make choice of Captain Porteous to command that day, as the person who had the most awe over the mob, and fittest to quell any disorders, if they should happen, never imagining his distraction would carry him to the height of what he did.

"But I must stop here a little, to give you the rise of the sentence of death against Andrew Wilson. There was a parcel of smugglers in Fife, who had been often herried by the custom-house officers there: They often vowed revenge, and

eagerly wished for an opportunity to make reprisals. An occasion offers; the collector has a considerable sum of money with him in Kirkcaldy; Wilson and Robertson, with some others, contrive among themselves to rob the collector of this money. They put their design successfully in execution, and carry off the money, are seized, and the money recovered to a trifle. Wilson and Robertson are tried, and condemned to be hanged; Robertson, by the help of Wilson, makes his escape, and Wilson stays behind to be hanged. They had both been carried from prison to a neighbouring church called the Tolbooth Kirk, upon a Sunday, to hear prayers and sermon, as it is the custom for persons condemned to die. Wilson and Robertson are standing with four soldiers of the City Guard, before the people were well assembled, and the minister come in, in the forenoon. All of a sudden, Wilson, a strong well-built man, seizes two of the soldiers and holds a third, by fixing his coat in his teeth; then he cries to Robertson, Run, Geordie, run for your life. Indeed, Geordie got over the seats, and made his escape. *

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* "*Edinburgh, Monday, April* 12, 1736.—Friday morning last, about two o'clock, the felons in the city jail made a grand attempt to escape; for which purpose Ratcliff and Stewart, horse stealers, some time brought over from Aberbrothock, had dropt a pack-thread out of a window, to the end of which their accomplices tied spring bows and some other accoutrements, wherewith Ratcliff and

"The multitude were charmed with Wilson's generous action, and not ill pleased with Robertson's

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Stewart cut through the great iron bars that secure a very thick window on the inside, and afterwards the cross grate in the window; they then cut a large hole in the floor of their apartment, which is immediately over that wherein Robertson and Wilson (condemned to suffer Wednesday next) lie; which last, in return for this friendly office, contributed in the following manner to bring about their mutual escape, viz. Ratcliff and Stewart lay every night nailed to the floor, by a long iron bar fifteen inches round, the supporters whereof detain prisoners at the middle of the bar, and are fastened with smaller iron bars passing through the floor to the apartment below, fixed there with wedges through eyes; which wedges being struck out by Robertson and Wilson, Ratcliff and Stewart had access to shift themselves to the end of the bar, and unlock it. Being thus disengaged, they hauled Robertson and Wilson up through the hole, and then proceeded to break out at a window fronting the north; and, lest the centinel on duty at the Purses should mar the design, their associates in woman-dress had knocked him down. Stewart accordingly came down the three storeys by a rope in his shirt, and escaped; Wilson essayed it next, but being a squat round man, stuck in the grate, and before he could be disentangled, the guard was alarmed. Nor was it possible for the keepers to hear them at work; for whenever those in the upper apartment fell a sawing, they below sung psalms. When they had done, Millar of Balmeroy, his wife, and daughter, tuned up another in their apartment, and so forth.

"Yesterday forenoon Robertson and Wilson were carried from prison to the Tolbooth Kirk, to hear their last sermon, but were not well settled there when Wilson boldly attempted to break out, by wrenching himself out of the hands

escape: They are always on the side of humanity and mercy, unless they are engaged themselves.

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of four armed soldiers. Finding himself disappointed here, his next care was to employ the soldiers till Robertson should escape; this he effected by securing two of them in his arms; and, after calling out, *Geordie, do for thy life!* snatched hold of a third with his teeth. Hereupon Robertson, after tripping up the fourth, jumped out of the seat, and run over the tops of the pews with incredible agility, the audience opening a way for him sufficient to receive them both; and in hurrying out at the south gate of the church, he tumbled over the collection-money. Thence he reeled and staggered through the Parliament Close, and got down to the New Stairs, and often tripped by the way, but had not time to fall, some of the guard being close after him. Passing down the Cowgate, he run up the Horse Wynd, and out at the Potterrow Port, the crowd all the way covering his retreat, who by this time were become so numerous, that it was dangerous for the guard to look after him. In the wynd he made up to a saddled horse, and would have mounted him; but the gentleman to whom the horse belonged prevented him. Passing the Cross Causeway, he got into the King's Park, and took the Duddingstone road; but seeing two soldiers walking that way, he jumped the dike, and made for Clearburn. On coming there, hearing a noise about the house, (dreading it might been from those whom the Magistrates had sent after him,) he stopt short, and, repassing the dike, he retook the rout for Duddingstone, under the rocks. When he crossed the dike at Duddingstone, he fainted away; but, after receiving a refreshment, the first (he said) he had tasted for three days, passed out of town, and soon after getting a horse, he rode off, nor have we since heard any further of him, notwithstanding all the search made."

The captain was enraged against Wilson, who had affronted his soldiers, and the mob, who had favoured Robertson's escape, and approved of Wilson's generosity: He had time enough betwixt Robertson's escape and Wilson's execution to work himself into a fury. He thought himself affronted; it would reflect upon the Magistrates, his masters, and incur the displeasure of the Government. This, with a habitual contempt, and a mortal grudge he bore to multitudes, wrought into his breast all the rage and emotions of a madman. The day of Wilson's execution his countenance was pale, his eyes rolling and staring, his mouth foaming, his voice broke and confused, his

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"Upon Robertson's getting out at the church-door, Wilson was immediately carried out, without getting sermon, and put in close custody, to prevent his escape, which the audience seemed much inclined to favour. So that he must pay for all Wednesday next."—*Caledonian Mercury.*

"*Thursday, April* 29.—We are told, that George Robertson, sometime stabler at Bristo Port, and who lately made the surprising escape while under sentence of death, was on Tuesday night last at a certain house in the neighbourhood of this city; and being talked to by the landlord, touching the risk he run by his imprudence, and that if he was catched, he would suffer unpitied, or as a madman; answered, that, as he had thought himself indispensably bound to pay the last duties to his dearly beloved Andrew Wilson, by accompanying his funeral, he had been hitherto detained in the country, but that he was now determined to steer another course very soon. However, that he had laid his account not to be hanged—pointing to some weapons he had about him."—*Ibidem.*

whole gait full of disconcerted and disorderly steps; and, what helped most to make him mad, was the bringing up a part of the Welsh Fuzileers, then lying in the Canongate, as if he and his guard had not been sufficient to keep down any mob within the city. He thought this was an affront both to the town and himself.

"Many were of opinion, that the bringing in of a military force to the town was not quite so prudent, from the bad consequences it might have had, and may yet have; but that for the city to have had its constables, deacons of crafts, a part of the Town Guard and common officers, in ordinary clothes, mixed among the multitude, to observe who began first, with the other part of the Town Guard under arms, to receive the prisoners, if any should be, and even to add to these such of the Train Bands and their officers, as the governing powers of the city should think fit to order out *nominatim*, if the others were not thought sufficient, had been more for the honour, as well as more for the safety of the city. By that they would have shewn they were able to govern themselves, and others too, within their gates, without any foreign assistance, and could distinguish citizens and inhabitants from strangers, if any was on the mad work of mobbing.

"However, when Porteous came to receive Wilson the prisoner from the captain of the city prison, he had wrought himself into a terrible disposition. When the manacles were too little for

Wilson's wrists, and the hangman could not make them meet, he flew furiously to them, and squeezed, the poor man crying, and he squeezing, till he made them meet, to the exquisite torture of the miserable prisoner, who told him he could not have one serious thought, so necessary to one in his condition, under such pain. 'No matter,' says Porteous, 'your torment will be soon at an end.' 'Well,' says the other, 'you know not but you may come to be in my condition; God forgive you.'

"This behaviour of his embittered the minds of the mob, who were sufficiently exasperated against him before, and was soon spread in town and country. They bore a great hatred to him, and he had no less a contempt of them.

"He guarded Wilson to the gallows, where he was hanged dead, without the least disturbance. When the hangman was cutting him down, some stones were thrown at him, and one of them hit him on the nose and bled him; the hangman hastened down and took shelter among the soldiers; the mob continued to throw at him, hit some of the soldiers, and broke the head of their drum. Upon which Porteous himself fired, and called to his soldiers to fire, more than once; they obeyed, seven or eight are killed, more wounded and it was a wonder that there were not more of both. If the throwing of stones by the mob was a good reason for firing, then there never had

been an execution without killed and wounded; nay, not a whore nor a thief scourged through the town without it. It is ordinary for the rabble at Edinburgh, moved with the common sentiments of humanity, upon such occasions, without being able to comprehend the ends of society, to let fly stones at the hangman. Captain Porteous was not unacquainted with this custom, which made him the more inexcusable not to contemn it, and to march off his men as quick as he could, since the thing was done which he came for.*

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* "Yesterday being the day fixed for the execution of Andrew Wilson, for the robbery of Collector Stark; and it being strongly surmised, that plots were laid for favouring his escape also, from a sympathy the populace had generally conceived with him, preferably to his associates in that ugly scrape; the Magistrates, to defeat all hopes of whatever attempt that way, put the executioner the day before into the tolbooth, to prevent his being carried off, the centinels were doubled on the prison without, besides those posted within; the officers of the trained bands were ordered to attend the execution, also the constables with long batons; the whole city guard had ammunition distributed to them, and marched to the place of execution, bayonets screwed on their pieces, intermixed with the town-officers; and to make the work very sure, a small battalion of the Welsh Fuziliers (headed by six Captains or other commission officers) marched up the streets of the city, and drew up on each side of the Lawnmarket, upon application of the Right Honourable the Lord Provost, whilst another body of that corps stood under arms at the

"The king, at this time, was visiting his foreign dominions, where he had staid much longer than

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Canongate guard. At two o'clock Wilson was carried from prison to the Grassmarket, manacled, where he died very penitent, but expressing more sorrow on account of the common frailties of life, than the crimes for which he suffered. He was a stout young man, a bachelor, and his body was delivered to his friends, who carried it over to Fife.

"Nor was there, during the whole procession, or after he had hanged till he was dead, the remotest appearance of a riot, or the least disturbance on the part of a vast crowd of people; till after the Magistrates had retired from the scaffold to a house hard by, reasonably concluding there could now no disturbance happen, and the executioner was actually on the top of the ladder cutting Wilson down, when a few idle boys, or rather children, began to throw some pebbles or garbage at him, as is (very foolishly) practised at all executions, and the rather now, that he was treating the affair ludicrously; which was so highly resented by Mr Captain Porteous, who commanded the City Guard, that, without the least authority from the Magistrates, or offering to read the proclamation, as is directed, the guard, at his precept and example, fired sharp dropping shots among the crowd, whereby about twenty persons were killed or wounded. Among the slain are,

"1. Henry Graham, tailor in Canongate, shot through the head while looking out at a window two stairs up.

"2. Alexander Macneal, in Monktonhall.

"3. John Anderson, son to George Anderson of Craighead, Esq.

"4. Charles Husband, relation and servant to Paul Hfsband, confectioner. The three last were killed on the street with slug shot.

was expected, betwixt seven or eight months; the ministry was anxious to have him home, the Queen

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" Among the wounded are,

" 1. Archibald Ballandine, a young gentleman at the school of Dalkeith, so mortally wounded that he cannot live.

" 2. James Niven, brewer, shot in two places of the head, and in the arm.

" 3. Patrick Spalden, son of ——— Spalden of Ashintully, Esq. and apprentice to Mr David Mitchell, jeweller, twice shot in the head, and twice in the right shoulder, lies dangerously ill.

" 4. Jean Peat, servant to James Macdowal in Deanhaugh, shot in the head, side, and arm, and will not recover.

" 5. David Kid, tailor, wounded in the breast.

" 6. James Philip, servant to Captain Lauder, mortally wounded in the breast and arm.

" 7. David Wallace, wright, servant to Mrs Alison, shot through the upper jaw and right side.

" 8. Margaret Gordon, (of Elgin,) servant to David Ogilvie, tailor, mortally wounded.

" 9. Margaret Arthur, residenter at the Watergate, shot in the left shoulder, and twice in the right arm, lies dangerously ill.

" 10. and 11. Alexander Wallace, and James Lyel, servants to Mr Wright, staymaker, the one shot in the arm, the other in the belly.

" The Magistrates (after ordering the killed and wounded to be buried and looked after at the city's expence) immediately convened in council, and after taking a precognition touching this unhappy event, the Lord Provost, as High Sheriff, ordered Mr Porteous to close prison for eight days, and to be afterwards detained in custody till liberate in course of law. He was accordingly carried to prison by his own guard, without which the mob had unquestionably

was uneasy at so long an absence, and the city of London grumbled at the want of him. It was

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finished him, so exasperated were they on seeing their innocent fellow citizens wallowing in their blood, and that the same should have been shed by those nursed up in our own bosom, while, on the other hand, both officers and soldiers of the military detachment behaved with all honour."—*Caledonian Mercury*, April 15, 1736.

"Various accounts having been given of the melancholy event that happened at the execution of Andrew Wilson upon Wednesday last, the 14th of April instant, in order to satisfy the world as far as we can, we thought proper to publish the following account of it; part of which we had access to witness, and partly what clearly appears by declarations emitted before us.

"When the criminal was thrown over, the Magistrates (according to custom) retired to a public house near the place of execution. Hitherto there was no appearance of any tumult, nor till the executioner was about to cut him down, when some idle persons threw a few stones at him, some of which falling among the city guard, that day commanded by Captain Porteous; whereupon he, in an unwarrantable and barbarous manner, first discharged his own piece among the spectators, and at the same time ordered his guard to fire in like manner, using these words, *Fire!* ——— *and be damned!* without the least orders from the Magistrates, who were then attending, and from whom he should have received his orders. The Magistrates, ministers, and constables, were stationed in the first storey of a house to the street, were themselves in danger of being killed, a ball having grazed on the side of the window where they stood, (but this was not known till some time after.) A dropping fire continued for some time, but the firing being over, the Magistrates were put into a great consternation, upon some

thought proper to represent this affair of hanging Porteous in the most hideous colours, as if all Scotland was upon the point of turning mutinous, and that a restless set of men, called the Patriots, were at the bottom of it, to see if this could prevail upon him to return soon home, to compose the rising disorders of that kingdom by his royal presence; but this had no other effect than to root a

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persons coming to them, and informing that several dead bodies lay on the streets. Upon this, one of the magistrates flying to the window, found it but too true, and instantly calling for his officers to give the necessary orders for immediate assistance, to his great surprise they were all removed; and the guard was now marching off. One of the magistrates immediately repaired to a tavern in the Lawnmarket, where the Lord Provost and some of the council were attending, to give proper orders to the detachment of the Royal Welsh Fuziliers, posted before them, to whom he gave account of this dismal scene. Hereupon Captain Porteous was ordered forthwith to attend the magistrates in the burgh room, when they proceeded to an examination of what had passed, and have ever since been closely employed in taking the precognition, in order to do all justice to the injured, so far as is in their power. That night, upon the declarations emitted before them, the Lord Provost committed the Captain to close prison, (though he denied he had either fired himself, or given orders to his guard to fire,) until his trial for life in due course of law. Next day 15 centinels of the guard were committed to the same effect; it appearing clearly, after a careful examination of all the firelocks of the party, that they were the persons who discharged their pieces. The above narration is attested by T. CROCKAT, *B.* GAVIN HAMILTON, *B.*"—*Caledonian Mercury*, April 19, 1736.

mortal prejudice against the town of Edinburgh, and in some measure against all Scotland." *——

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* "Tuesday night last, a most outrageous and violent insult to the laws and constitution of the nation was made in this city, that perhaps ever happened in any civilized country, viz.

"A few minutes before ten at night, a multitude of people, most of them from the country, rushed in upon the City Guard on a sudden, turned out the whole soldiers, and seized all the fire-arms, &c. in the guard. At the same instant of time, others, having posted themselves near the several gates of the city, made themselves masters of the same, and then attacked the prison. The Magistrates, with several members of the council, and burghers, attempted to suppress them, but they threw stones in so violent a manner, and wounded several of those that attended the magistrates with Lochaber-axes and butts of muskets, and at the same time threatened to fire, that they were forced to retire. The mob, now finding themselves absolute masters, immediately set fire to the prison door, and in less than an hour forced their way up stairs; they then dismissed all the prisoners, seized Captain Porteous, dragged him down stairs, and hurried him through the streets to the Grassmarket, where they broke open a shop, and took out a coil of ropes, tied it by one end about Mr Porteous's neck, and throwing the other end over a dyer's cross-trees, close by the common place of execution, hoisted him up and hanged him. The body was taken down about break of day, and put into a church hard by.

"This forenoon his corpse was interred in the Grayfriars church-yard.

"Last night, about 50 of the Welsh Fusileers, commanded by proper officers, reinforced the garrison of the Castle; two companies of the City Trained Bands mounted guard in the

So far the author of the pamphlet. On the 1st of April the Lord Provost of Edinburgh was tak-

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borough-room and council-house, and there was a guard at the Netherbow. But there was not the remotest appearance of disturbance all night; nor, indeed, have we heard of any other mischief done the night the riot happened, but what is above narrated.

"No less than seventeen criminals escaped from the city jail on this occasion, among whom are the dragoon who was indicted for the murder of the butcher's wife in Dunse, the two Newhaven men lately brought in from Blackness Castle for smuggling, seven centinels of the City Guard, &c. The prisoners in the City Guard were in like manner set at li-

berty.

"About fourteen tradesmen, or others, were taken up the morning after the riot, and committed to the Canongate prison, eleven of whom are since discharged; but the other three, not giving so good account of themselves, remain in custody."—*Caledonian Mercury*, Sept. 9, 1736.

"The narrative in our last with relation to the surprising and unparalleled riot that happened in this city the 7th instant not having been so particular as the world might expect, from an event so uncommon in all its circumstances, we have thought proper, by way of supplement, to give the following disinterested relation thereof, as from the best information could be collected, willing always, if what is here related shall at any time appear to have proceeded from misinformation, to retract either facts or circumstances. And it is reported,

"1. That a body of strangers entered the West Port betwixt nine and ten at night, who, having seized the Portsburgh drummer by the way, brought along his drum, and some of them advancing up into the Grassmarket, beat a call to arms; then called out, *Here! all those who dare*

en into custody, and after enduring a confinement of three weeks, was admitted to bail. He was then

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avenge innocent blood! This probably was a signal for their associates to fall on, in regard it was followed by instantly shutting up the gates of the city, posting guards at each, and flying centinels at all places whence a surprise might be expected, while a separate detachment threw themselves upon and disarmed the City Guard; and, seizing the drum, beat about the High Street, to notify (it is thought) their success so far. At that instant, a body of them advancing to the tolbooth, called for the keeper; and, finding he was gone, fell a breaking the door with fore-hammers; but, making no great advances that way, they got together a parcel of broom, furze, (or whins,) with other combustibles, and heaps of timber, placed over a barrel of pitch, they set fire to the latter with the flambeaux they had taken from the city officers, when they repulsed the magistrates with showers of stones, and threats to discharge platoons of fire-arms among them, if they offered to appear in the streets at night; and it is even said they placed centinels to eye the motions of the magistrates. It is reported,

"2. That, upon the prison door taking fire, several citizens, particularly two gentlemen, made up to the rioters, and expostulated touching the imminent danger of setting the whole neighbourhood on fire, insinuating that this outrage might come to be highly resented; but were answered, that they'd take care no prejudice should happen to the city; and that, for the rest, they knew their business, and that they (the gentlemen) might go about their's. It is reported,

"3. That, before the prison door was near burnt down, severals rushed through the flames, up the stairs, demanded the keys from the keepers, and though they could scarce see one another for the smoke, got into Captain Portcous's

commanded to attend the House of Lords, together with the four Bailies and three Lords of Justiciary;

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apartment, calling, *Where is the* ——— ? He is said to have answered, Gentlemen, I am here; but what are you to do with me? And that they answered, We are to carry you to the place where you shed so much innocent blood, and hang you. That he begged mercy; but finding none at their hands, requested some time to prepare himself; but that they instantly seized and pulled him to the door, in his night-gown, cap, and breeches; but he struggling, they caught him by the legs, and dragged him to the stairs-foot, while others set the whole prisoners at liberty: That he was set upon his legs how soon he was brought to the street, some seizing him by the breast and arms, while others pushed behind, thus conducting him to the Bow head, where they stopped a little, at the pressing solicitations of some citizens, that so he might die peaceably; but whose real view was to gain time, expecting every moment the Welsh Fuziliers from the Canongate, who, it was said, were to enter the city by the Trinity Hospital, or that the garrison of the Castle should come to his relief. Here he is said to have addressed some of the citizens who appeared in his behalf, and gave one of them 23 guineas, &c. for his brother's use. By this time, some who appeared to be in the direction ordering a march, he was hurried down the Bow, and to the gallows stone, where he was desired to kneel, confess his sins, particularly the havoc he had committed in that place, and to offer up his petitions to God. In a few minutes after, he was led to the fatal tree; but, on seeing the rope, made remonstrances, and caught hold of the tree; but, being disengaged, they set him down; and as the noose was about to be put over his head, he appeared to gather fresh spirit, struggled, wrenching his head and body. Here, again, some citizens appeared for

but the order to these Lords produced a debate upon a case not provided for by the articles of

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him, telling, that the troops being now in full march, they must all expect to be sacrificed, and that the artillery of the Castle would doubtless be discharged among them; and that they answered, No man will die till his day come. It is reported,

"4. That, a quarter of an hour before twelve, they put the rope about his neck, and ordered him to be pulled up; which done, observing his hands loose, he was let down again; after tying his hands, he was hauled up a second time; but, after a short space, having wrought one of his hands loose, he was let down once more, in order to tie it up, and cover his face. Stripping him of one of the shirts he had on, they wrapped it about his head, and got him up for a third time, with loud huzzas, and a ruff of the drum. After he had hung a long time, they nailed the rope to the tree; then formally saluting one another, grounding their arms, and the other ruff of the drum, they separated, retired out of town, and severals of them were seen riding off, in bodies, to all quarters, leaving him hanging till near five in the morning. It is also reported,

"5. That neither the gentlemen who conversed them at the tolbooth, nor those who were sent out by the magistrates to see if they knew any of the rioters, could say they had ever seen any one of them before, though the flames rendered it as light as at noon. So that it is generally believed no citizen acted any principal part in this tragedy; though, indeed, it is certain that many of the inhabitants, led by curiosity, stept out to behold the surprising boldness and incredible extravagance of this scene.

"Upon the whole, it would seem their plot was concerted with judgment, conducted with secrecy, enterprised with

Union, and for which there was no precedent, viz. How the Scottish Judges should be received on the wool-sacks, at the table or at the bar? By a plurality of voices they were ordered to attend at the bar in their robes.

An inquiry was set on foot in the House of Peers, respecting the legality and justice of the sentence pronounced upon Porteous, and a motion was made for having it declared erroneous, many members warmly censuring both the verdict of the jury and the sentence of the Court; these,

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resolution, and execute in the space of two hours, with unexpected success.

"Ever since the riot, an officer's command of the Welsh Fuzileers mounts daily in the Castle; the Canongate guard is reinforced all night, besides their picquet guard; the city company has a guard at the Netherbow, the gate whereof is locked back on both sides, that passage may be open at all times; two companies of trained bands mount guard each night; a troop of Lieutenant-General Gore's Dragoons arrived last Friday in Canongate, and another of the same at Leith."—*Caledonian Mercury*, Sept. 13, 1736.

"The grenadier and Colonel's companies of the Royal Regiment, commanded by Major-General Barrel, marched into the Castle last night for quarters. The other companies of said regiment are quartered in Leith, and suburbs of this city. The Royal Welsh Fuzileers remain in Canongate, where they mount a captain's guard each day, which is reinforced at night, beside their picquet guard. The City Guard keep post at the Netherbow. Our Trained Bands continue to mount each night, and observe exact discipline."—*Caledonian Mercury*, Sept. 23, 1736.

however, were at length justified, and the motion was finally dropped.

A formidable bill was next brought in for disabling the Lord Provost of Edinburgh from enjoying any office or place of magistracy in the metropolis of Scotland, or in any part of Great Britain; for imprisoning him in close custody for a twelvemonth; for abolishing the city-guard, * and demolishing the gates at the Netherbow Port. Notwithstanding the strenuous opposition this bill met with from the Duke of Argyle, who exerted all his powerful eloquence on that occasion, and many other Peers, it passed the House of Lords; but in the House of Commons, after meeting with strong opposition in every stage, and being assailed by the whole body of Scottish members, saving one, it was altered in its most essential parts. The clauses

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* Of late times we have seen that venerable corps disbanded, and, as it were, laid in the dust, together with their capitol, the Tolbooth of Edinburgh, round which they were so long wont to bask and stagger. But the curious in military figure and costume are recommended to consult Hogarth's print of the Lord Mayor of London's procession, for a delineation of heroes extremely similar to these; or rather the ingenious Mr Kay's likenesses, *ad vivum;* and the portraits of the Scottish monarchs at Holyroodhouse, which, shone upon by the setting sun, so as to give a ruddy tint to their prodigious noses, and with a slight allowance as to dress, must convey to the mind of the spectator a very accurate idea of the veteran City Guard of Edinburgh.

for imprisoning the Provost, abolishing the guard, and taking away the gates, were omitted; but in place of these, a fine of L. 2000, to be given to Porteous's widow, was imposed upon the city of Edinburgh, which made Mr Shippen* remark, that too much time had been spent in declaring a man incapable who was willing to declare himself so, and in providing for a cook-maid; the widow, however, in consideration of the favours shewn to her by the town-council, had the modesty to accept of L. 1500 in full. This bill was carried in the committee by a majority of one; the chairman, contrary to all precedent, voting in its favour; and it is to be observed, that two Scottish members, Mr Erskine of Alva, the Solicitor-General, afterwards Lord Justice Clerk, and Mr Erskine of Grange, brother to the Earl of Mar, were then pleading an appeal before the House of Lords, and were refused leave of absence, otherwise the bill would have been utterly lost.

For an account of the act of Parliament respecting the murder of Porteous, that gave, and it would seem justly, so much offence to the Scottish clergy, the reader is referred to the Romance which occasioned this publication, Vol. II. p. 155. Many pamphlets, the sorry weakness of that period, made their appearance on both sides; some wit and much argument were attempted; the former grossly dull and vulgar; the latter so confused with

* Commons' Debates.

Jacobitical allusions, Erastianism, Homologation, and other obscurities of phraseology, that the most pertinacious tract reader of the present day will find great difficulty in wading through one of these Letters, or Conferences, or Collections of Observations, written by Grant, Webster, Lindsay, and others, whose names in manuscript have been preserved by the curious on the title-pages of their respective pamphlets. "Et vitula tu dignus, et hic."

In order to present an ample view of the whole affair of *the Porteous Mob*, the Trial of Wilson, Hall, and Robertson, is printed at full length from the Justiciary Record; the Trial of Porteous himself is reprinted from the Authentic Copy laid before Parliament at the time; and the Trial of Maclauchlane, a supposed accessary in the murder of the Captain, though stated by the pamphleteers of the day to have been a drunken idiot, incapable of contrivance or deceit, is also given in full from the original record. An engraving of the Tolbooth of Edinburgh (*"the Heart of Mid-Lothian"*) is prefixed, as a proper embellishment to this volume. It was erected by the citizens in the year 1561, for the accommodation of the Parliament and Courts of Justice, and for the confinement of debtors and malefactors. This building, rendered so singularly interesting to the mind by a thousand historical associations, was lately levelled with the ground, after having been used solely for a jail since the year 1640; a fabric which had been the

scene of Queen Mary's *Painted Orations*, as they are termed by Knox; of her son's ridiculous tremors at the approach of a mechanic rabble; and which had displayed on its dreary summits the heads of a Morton, a Gowrie, a Huntly, a Montrose, and an Argyle,—surely deserved a better fate! Nor will the regrets on its demolition be lessened after a perusal of the Tale which bears its name, so particularly well calculated to diffuse and to heighten its celebrity.

The tragical story of Nicol Muschett and his wife being so frequently alluded to in the "Heart of Mid-Lothian," we have subjoined to these trials some details respecting it. In Maclaurin's Decisions will be found a strange and shocking sequel, as the Judge himself terms it, of this affair, being an account of the trial of Campbell of Burnbank, a wretch deeply implicated in Muschett's guilt. The circumstances are too indelicate to be reprinted, but Campbell, on whose foul crimes several poems were composed by those who can make even murder "a sport for ladies," escaped the halter after all, and was only banished to his Majesty's plantations in America.

TRIAL

OF

ANDREW WILSON, WILLIAM HALL, AND GEORGE ROBERTSON,

BEFORE THE HIGH COURT OF JUSTICIARY, HELD AT EDINBURGH, MARCH 2. 1736.

CURIA JUSTICIARIA S. D. N. Regis, tenta in nova Sessionis domo burgi de Edinburgo, secundo die mensis Martii 1736, per honorabiles viros, ANDREAM FLETCHER de Miltown, Justiciarium Clericum, Dominum JACOBUM MACKENZIE de Roystoun, Magistrum DAVIDEM ERSKINE de Dun, Dominos GUALTERUM PRINGLE de Newhall, et GILBERTUM ELLIOT de Minto, et Magistrum ALEXANDRUM FRASER de Strichen, Commissionarios Justiciariae dict. S. D. N. Regis.

Curia legitime affirmata,

Intran.

ANDREW WILSON, late in Pathhead, WILLIAM HALL, indweller in Edinburgh, and GEORGE ROBERTSON, stabler in Bristo, all prisoners in the Tolbooth of Edinburgh, *Pannels*, INDICTED and ACCUSED, at the instance of DUNCAN FORBES of Culloden, Esq. His Majesty's Ad-

vocate, for his Highness' interest, for the crimes of *Stouthrieff*, *Housebreaking* and *Robbery*, as is more fully mentioned in the indictment raised against them thereanent, MAKING MENTION, That where by the common law, the laws of all well-governed realms, as well as the municipal law and practice of this kingdom, Housebreaking, Stouthrieff or Robbery were crimes of a high nature, and most severely punishable, especially when done and committed under cloud of night and upon public officers having in their possession money belonging to the public, and so more immediately under the protection of law: NEVERTHELESS it was of verity, That they the saids Andrew Wilson, William Hall and George Robertson, and each of them, shaking off all fear of God and regard to his Majesty's laws, had presumed to commit, and were guilty and accessory, or art and part, of all and every, or one or other of the foresaid crimes, aggravated as aforesaid; IN SO FAR AS James Stark, Collector of Excise in Kirkcaldy, being upon his circuit in collecting that revenue, and having along with him a considerable sum of money collected by him by virtue of his office, upon Friday, the ninth day of January last, or one or other of the days of that month, was at the house of Margaret Ramsay, relict of Andrew Fowler, excise-office keeper at Pittenweem, and he the said Andrew Wilson having formed a design to rob the said James Stark of the money and other effects he had along with him, and having taken them, the saids William Hall and George Robertson, as associates in their wicked and villanous contrivance,

they came together from Edinburgh that morning, and towards the evening put up their horses in Anstruther Easter, in the inn kept by James Wilson, maltman and brewer there; and after having had some deliberations upon their intended robbery, leaving their horses there, they went privately on foot to the said town of Pittenweem; and about eleven o'clock that night called at the house of the said Widow Fowler, and under the pretence of drinking, remained there until they were informed, or might reasonably presume the said James Stark was gone to bed; and about twelve that night, or one the next morning, or some other hour of that night, or very early next morning, they the said Andrew Wilson and William Hall, or one or other of them, did impudently, and in defiance of law, forcibly and with violence break the door of the room of the said house where the said James Stark was lying and in bed; and having beat out the under pannel, the said James Stark suspecting an attack upon his life, for his safety jumped out at a window in his shirt; whereupon they, the saids Andrew Wilson and William Hall, or one or other of them, intered into the said room, and did feloniously carry off bank-notes in a pocket-book belonging to the said James Stark, and gold and money in his possession to the value of Two hundred pounds Sterling, less or more, and did rob and away take a pair of pistols, a seal, a penknife, a cloak-bag, a pair of silver buckles, a bible, several suits of linens, and other goods belonging to the said James Stark, and in his possession; and when they returned out

of the said room, did divide, dispose of, and distribute the gold, money and other goods so robbed and taken away at their pleasure: And while they, the saids Andrew Wilson and William Hall, were committing the foresaids crimes, he the said George Robertson was standing sometimes at the door of the said house, and sometimes at the foot of the stair leading to the said house, where the room was so broken open, and from which the money and goods were robbed as aforesaid, as a sentinel and guard, with a cutlass in his hand, to prevent any person from interposing and stopping the said violence and robbery; and did threaten to kill, or otherwise intimidate the servants of the house when going towards the door of the said Collector's room; and when several of the inhabitants were gathered together upon the streets, and coming towards the door of the said house, inquiring what was a-doing there, having been alarmed by the noise, he the said George Robertson did treacherously endeavour to persuade them not to enter the said house, falsely affirming that he had endeavoured to go up stairs, but being in hazard of being shot, he was by fear obliged to leave the house: And in order to keep them still amused with his false suggestion of danger by entering the said house, having gone along with them into the house of John Hyslop in Pittenweem, he detained them there for some time until he judged that his associates might have made their escape with their spoil, and soon thereafter he the said William Hall was seized in the street of Anstruther Easter, between the hours of twelve and

one in the morning of the tenth day of the said month of January, or one or other of the days of the said month, having several of the goods and a purse of gold so robbed in his possession, which he dropt and endeavoured to conceal: And they, the saids Andrew Wilson and George Robertson having met some short space thereafter, in the house of the said James Wilson in Anstruther Easter, when they were informed that the house was beset, conscious of their own guilt, they, or one or other of them, did deliver to the said James Wilson the seal, the penknife, the pair of buckles, some money, and other things robbed as aforesaid, telling, that if they were found in their possession, they would be hanged or undone, or words to that purpose; expressing an apprehension of the utmost danger, and immediately thereafter got into bed, as if they had been laid to sleep, where both of them were seized and apprehended; and upon the top of which bed were found the bank-notes robbed from the said James Stark, and his pocket-book above another bed in the room they first went into, when they returned to the said house. AT LEAST, at the time and place aforesaid, when the said James Stark was lying in bed, the door of the room was broken as aforesaid, and he was robbed of the goods and others before mentioned; and they the said Andrew Wilson, William Hall, and George Robertson, and each of them, were art and part in the housebreaking, robbery and stouthrieff; by all which it was manifest that they and each of them were guilty, and actors, art and part, of the foresaid crimes, aggravated as aforesaid: AND

WHICH FACTS, or part thereof or that they or either of them were guilty, art and part, of all or any of the foresaid crimes, being found proven by the verdict of an assize before the Lords Justice-General, Justice-Clerk, and Commissioners of Justiciary, they ought to be most severely and exemplarily punished with the pains of law, to the terror of others to commit the like in time coming.

Pursuers.	*Procurators in Defence.*
Mr HUGH FORBES, his Majesty's Advocate Depute,	Mr HUGH DALRYMPLE,
Mr JAMES GRAHAM,	Mr WM. GRANT,
Mr PETER WEDDERBURN,	Mr ALEX. LOCKHART,
Mr ALEX. HOME,	Advocates.
Advocates.	

The libel being openly read, and debate *viva voce* in presence of the judges, pannels, and jury, the Lords ordained both parties to give in their informations to the clerk of court in order to be recorded; the pursuers to give in theirs against Friday next at six o'clock at night; and the proloquitors for the pannels to give in theirs against Monday thereafter; and continued the cause till this day eight days, being the 9th instant, and [redacted] assizes and witnesses then to attend, and the pannels to be carried back to prison.

INFORMATION

FOR

DUNCAN FORBES of Culloden, Esq. His Majesty's Advocate, *Pursuer*;

AGAINST

ANDREW WILSON, WILLIAM HALL, and GEORGE ROBERTSON, *Pannels*.

THE pannels stood indicted as guilty of the crimes of Housebreaking, Stouthrieff, or Robbery: IN SO FAR AS they, or either of them, upon the time and at the place mentioned in the indictment, did violently break open the door of the room in the Excise-office in Pittenweem, where James Stark, Collector of Excise, was lying at the time; and he having from thence escaped by a window, for the safety of his life, the said pannels did feloniously carry off from the said room bank-notes, gold, and money, a pair of pistols, a seal, a pen-knife, and other goods, which belonged to the said James Stark; and when the said pannels were apprehended, part of the said money, bank-notes, and goods, were found with them, as is more fully specified in the indictment: AT LEAST, when the said James Stark was lying in bed, the door of the

room was broke open as aforesaid, and he was robbed of the goods and others above mentioned, and the pannels and each of them were art and part in the housebreaking, robbery, and stouthrieff.

AT HEARING of the cause, the pannels pled *Not Guilty*; and the proloquitors in defence, after having endeavoured to evade the premeditated design of committing these crimes of which the pannels were charged, by alleging that they came to the place libelled in order to purchase brandy, without condescending so much as upon one act tending that way, or any one person with whom they were to deal, proceeded to object to the relevancy of the indictment as laid.

1*st*, That in so far as the pannels were charged with the crime of housebreaking. It appeared from the indictment itself that the pannels came peaceably into the house of Widow Fowler, which was a public house, and continued there drinking for some considerable time; and being thus peaceably admitted, although it should be proved that they, or either of them, broke open the room where the Collector was lying, this did not amount to the crime of house-breaking, no more than that crime could be inferred from the pannels breaking up of chests, cabinets, and other lockfast places.

But, with submission, the pursuers could not discover how this distinction was founded either in law or common reason; for where there are different apartments in a house, whether public or private, every one of these several apartments possessed by different persons, is the house or domicile of

such person who resides there; and an attack made upon the possessor for the time would infer the crime of hamesucken, as much as if the same attack were made upon that person in a house belonging to him in property; and therefore, in the eye of the law, such room or apartment must be deemed the possessor's house, and the breaking in upon that room or apartment must be housebreaking with respect to the party who resides there, and who rises and lies by night and by day.

By the act 22d. Ch. II. parl. 1. sess. 1. homicide committed upon thieves and robbers breaking houses in the night, is declared not punishable by death. If a thief or robber shall have got into a public hall without violence, by the door being casually left open, and in the attempting to break open one of the apartments the possessor shall kill such thief or robber, he would be free from any capital punishment in virtue of the statute, which he would not be, if breaking up of the door of the room or apartment where he resided was not housebreaking in the eye of the law; and if the Collector, when the attempt was made upon the door by the pannels, had shot one of them, his defence upon the statute would have been good, in the same manner as if the thief or robber had been shot when breaking open the outward door or any windows of the house; for in the present case, it did not import whether the violence was made upon the door of the Collector's room, or if it was upon any of the windows. The danger of his life and goods which the law respects, was equal in both cases; and if breaking in at the

window of this apartment be housebreaking, so must the breaking in at the door; and for the same reason, breaking in at the door or window of a room or apartment where any person resides for the time, must be a different crime from breaking up of chests, cabinets, or other lockfast places, though both, indeed, were equally capital, but the one more atrocious than the other, in so far as it was accompanied with violence, as would hereafter appear in answer to the following objection.

It was objected for the pannels, *2do*, That as the facts with which the pannels were specially charged did not amount to housebreaking, so neither did they amount to stouthrieff or robbery, which the procurators in defence were willing to take as synonymous terms, for one and the same thing; for that the pretended robbery or stouthrieff could not be committed but where the person to whom the goods did belong that were carried off was present at carrying them off, because where such person was absent, the act of carrying off the goods, though it might amount to theft, with which the pannels were not charged, it could not amount to robbery, with which they were charged.

In answer, the pursuer conceived it was not very material under what name the crime was described in the preamble of the indictment, if the special fact charged upon the pannels did amount to a crime capitally punishable by the law. Pannels were not usually charged with generic crimes by themselves, and if no more had been contained in the indictment, but that these pannels had been

guilty of housebreaking, robbery, and stouthrieff, without any other qualification, it would be a great doubt if such indictment would be sustained. On the other hand, if pannels were charged with a specific fact, obviously amounting to a capital crime, supposing the generic crime under which such a *species facti* might be comprehended was not mentioned, the indictment doubtless would be relevant, and there could be as little doubt, that in the present case, the fact with which the pannels were charged, namely, the abstracting and carrying off another man's goods by violence, in order to the abstractor's private advantage, was a crime capitally punishable by our law, though this crime, no more than theft itself, might not, by the Roman law, be so punishable.

But, 2*do*, The generic crime was justly described in the preamble or major proposition of the indictment, as well by the name of robbery as stouthrieff or housebreaking; and it was a matter of little importance in the present question, whether stouthrieff and robbery might be synonymous terms, or if they were different terms importing separate and distinct crimes; seeing, under the generic crimes mentioned in the preamble, the *species facti* in the subsumption or minor proposition were fully and adequately comprehended. Stouthrieff, as Sir George Mackenzie describes it, is a stealth committed with violence; and, in the title Theft, No. 18. he applys stouthrieff, called by the Doctors *Roboria* or *Rapina*, to the very *species facti* with which the pannels were charged. The way, says he,

whereby theft is committed, makes it oft decerned to be capital, as the stealing by breaking of houses, or if the stealth be committed masterfully, which, says he, is called stouthrieff with us.

Tertio, Therefore, wherever stealth may be committed in a clandestine and surreptitious manner, the crime of stouthrieff, which is the more atrocious of the two, may be committed where the stealing is masterfully or by violence, and consequently it must be of no import whether the owner of the goods so stolen and carried off was absent or present. And this is the rule laid down, L. 2. Parl. 23. ff. *Vi bonorum raptorum et generaliter dicendum est, ex quibus causis furti mihi actio competit, in re clam facta, ex iisdem causis, habere me hanc actionem.* And therefore it is, that Matthæus, h. t. defines *rapina*, which is robbery or stouthrieff, to be *violenta ablatio rei alicujus, facta dolo, malo animo lucrifaciendi:* which is nothing else but the definition of theft accompanied with violence, in which *dolus malus* is always included. And, therefore, whether the person owner of the goods was present or absent when this stouthrieff or theft by violence was committed, could make no difference in the present question. Our practique seems to have gone farther, in sustaining libels, especially at the instance of his Majesty's Advocate, where neither the persons who were robbed, nor the goods robbed from them, were condescended upon; as in the case of Macgibbons, 8th December 1676, where all that was libelled

was only in general, that the pannel did frequently rob the houses of Gairntully and Strahurd's tenants; and although in this case the pannel was charged with [illegible] robbings, yet still the instance showed that it was no necessary qualification in robbery that the indictment should bear the persons from whom the goods were robbed were present the time the robbery was committed.

Quarto, Supposing, for once, the presence of the party whose goods were carried off, was an essential requisite to the qualifying of the crime of robbery. The party in the indictment said to be robbed, was present when the robbery began, that is, when the pannels were breaking open the door of the room where the Collector was lying a-bed, and if he did not stay to be murdered as well as robbed, that could never alter the nature of the other crime of robbery, which was begun by the violence committed in breaking open the door, while the Collector was still in the room; for if by threats and violence a person is drove from his house by thieves and robbers for the safety of his life, when these thieves and robbers by violence enter the house and carry off the goods, the house is as much robbed, that is, the robbery is as much committed in the absence of the proprietor drove away by threats and violence, as if he had remained within the house when the robbery was completed.

The only ground for the argument taken up by the procurators in defence was, that the attacking a person upon the highway and taking his money

or goods from him, generally goes under the name of robbery.

But these general names, taken from what most frequently falls out, is no ground for a distinction in law. This surely is one species of robbery, and which, properly speaking, is called robbery on the highway; but it is not the only fact that gives essence to the crime of robbery, which may be committed many ways, and in this way, where the proprietor of the goods happens not to be present at completing of the act, and even with respect to robbery committed on the highway; for if robbers, with offensive weapons, threaten waggoners, carriers, or coachmen with death if they remain about their waggons, carts or coaches, that so they may commit the robbery with greater security and deliberation, whereby they may have the opportunity of carrying off things which are most valuable, and if these persons shall run off and be out of reach or sight while the act is completing by carrying off the goods, it is as much robbery and felony, as if these persons had been allowed to remain.

In the *third* place, the procurators in defence endeavoured to separate the case of one of the pannels, George Robertson, from that of the other two, by reason that the indictment does not bear that he was present at the breaking open of the door, or at the carrying away the money and other goods out of the Collector's room.

But, besides that all the pannels were charged as being art and part of the crimes specified in the indictment, there appeared to be abundance of par-

ticulars charged upon Robertson to bring him in as one of the chief actors in the foresaid crimes. He came along with the other two from Anstruther, where they all three left their horses under cloud of night, to Pittenweem; and hitherto he had not been able to condescend upon any lawful business he had to do that night at Pittenweem: he said, indeed, he called for one Pollock, but as he had no business with this Pollock, so it would be proved that Pollock was at home all that night, and nobody called for him; and as Robertson came along with the other pannels to Pittenweem in this suspicious manner, so he continued with them till the robbery was begun, by attempting to break open the door of the Collector's room, and then he stood sometimes within the house, threatening to kill the servants and otherwise intimidating them from giving any assistance to the Collector, sometimes at the door, sometimes at the stairfoot with a cutlass in his hand, as a sentinel or guard, that his accomplices might carry on their theft with the greater security, and then the false and feigned pretexts with which he diverted persons actually coming to the assistance of the Collector, and people in the house from going into the house, that so the robbery might be the more effectually carried on, were such overt acts of concurring in the actual robbery, that it might be doubted which of the three was most criminal.

It was in vain to pretend that the cutlass was not drawn, and that he met with the persons he afterwards went to drink with, not at the door, nor at

the stairfoot, but whilst he was walking in the streets.

These were all affected pretences. Robertson was present with the others when the resolution was taken of forcibly breaking open the door and robbing the Collector: he was within hearing of the strokes given to the door; yea even within sight of it, and instead of alarming the neighbourhood, which he might have done if he was calmly walking the streets as he said, he threatened to kill the persons within if they gave any assistance to the Collector, or hindered the breaking open of the door, and diverted and withdrew others that were without with false suggestions, without the least intimation of the true fact, the design of robbing the Collector, to which he was privy; and after the robbery was committed, he resorted to and haunted with these his other accomplices, and was apprehended with one of them lying in the same bed. And if these were not qualifications of Robertson's being equally actor in the crimes libelled with the other two, as the pursuer humbly conceived they were, they were at least the strongest qualifications of art and part that could be devised or imagined, whether the cutlass was drawn or not; for if he had it about with him, it was easy for him to draw and make use of it so soon as there should be occasion for it by any opposition.

The only defence proponed, by way of exculpation for all the pannels, was, that what they did in breaking open the door of the Collector's room and robbing him of his money was through drun-

kenness, which the defenders pretend ought to excuse at least from *pœna ordinaria*; and however drunkenness might be pled as an alleviation in some crimes, the commission whereof might have a necessary connection with the raising of a person's spirits, who might be occasionally compelled to drink more strong liquor than he was in use to do, or was inclined to do, as the giving of opprobrious names or even strokes, which the party would have been far from offering if he had not been intoxicated with drink; yet this could be no alleviation, but was rather an aggravation of the crime: 1*st*, Where the party was under no compulsion to drink more than he was inclined to, and this was the opinion of Matthæus, Tit. de Poenis, No. 9. *Quod si suo vitio ebriosus, aliquis in calamitatem inciderit, adeo non est misericordiae dignus, ut etiam duplicem poenam meruisse videatur.* Nor, 2*dly*, Where the crime committed, as in this case, requires time, deliberation, and art to the completing of it, and so has no manner of connection with the ordinary effects which strong liquor usually occasions or produces in men. The author just now mentioned ranks *libido* in the same category with *ebrietas*; and as to the point of alleviation deduced from the one, he says, *Quam enim absurdum hoc mitigetur mihi poena, quoniam libidinis aestrovictus alienam matrem familias pollui, imprimis cum non repentinus sit amoris impetus, ut irae?* So that where the crime and the circumstance of the person admitted of deliberation and of time for reflection, and required art and strength to go about it, it was in vain to pretend to any al-

leviation on the account of having drunk too much strong liquor, or any other incitement of the passions; and, indeed, least of all, where the crime itself was the result of avarice and covetousness, which, by the strength of wine, was rather dispelled than incited.

2do, When the circumstances of this case, as libelled, were considered, they were utterly inconsistent with the defence: And therefore, if these facts were true, which the pursuers offered to prove, the defence ought thereby to be overruled and altogether repelled.

For in the *first* place, The libel takes notice that the pannels not only came under night on their foot to Pittenween from Anstruther, but that after the robbery was committed they returned thither. *Secondly*, The breaking open the door, and the creeping in through the hole of the door when broke open, was inconsistent with the degree of drunkenness which hinders consent and the voluntary act of the will. And if the pannels were possessed of both these, the crime was the same, as if they had drunk none at all. *Thirdly*, The art used by the pannels in order to prevent their being discovered to be actors in the foresaid crimes, was inconsistent with that degree of drunkenness which in any case whatever could be pled as an alleviation; for the libel bears, that when Wilson and Robertson were informed that the house in Easter Anstruther, where they were for the time, was beset, they did deliver to the master of the house the seal, the penknife, buckles, and other things robbed

from the Collector, that so they might not be found in their possession as evidences against them; and that this was the intention of the delivery, the libel further bears, that they told the master of the house, that they would be hanged or undone, or words to that purpose, if such things were found with them, and the bank-notes and pocket-book were at the same time carefully put out of the way.

So likewise as to William Hall, the other pannel. When he had returned from the expedition, and was seized in the streets of Anstruther, he dropped and endeavoured to conceal the purse of gold, and other goods which he had robbed, and did it so artfully, that some of these things were not discovered till next morning, upon the information of Hall himself, where and about what places he had so artfully concealed the goods and money. So that after these qualifications libelled, and offered to be proved, it must appear that the defence of drunkenness was merely affected by the pannels, who had nothing else to allege to give the least colour to so atrocious a crime. And therefore the same ought to be repelled, and the pannels with the libel remitted to the knowledge of the assize.

In respect whereof, &c.

JAMES GRAHAM.

INFORMATION

FOR

ANDREW WILSON, late in Pathhead, WILLIAM HALL, Indweller in Edinburgh, and GEORGE ROBERTSON, Stabler in Bristo, *Pannels;*

AGAINST

His MAJESTY'S ADVOCATE, *Pursuer.*

THESE three pannels were brought to trial for their lives, as the prosecutors at the debate declared to be their meaning, and that as guilty of the crimes of Housebreaking, Stouthrieff, or Robbery; in so far as, on the ninth day of January last, at the house of Widow Fowler in Pittenweem, the indictment bears, That Andrew Wilson having formed a design to rob James Stark, the Collector of Excise, of the money and other effects he had along with him at that place, and having taken with him William Hall and George Robertson as associates, came together from Edinburgh that morning, and towards the evening put up their horses in Easter Anstruther, in the inn kept by James Wilson, from whence, about eleven o'clock that night, they went on foot to Pittenweem, called at the house of Widow Fowler, where they drank till twelve

o'clock that night, or one, or some other hour next morning, when Andrew Wilson and William Hall, or one or other of them, did break a pannel of the door of the room where James Stark was lying, and jumped out at the window in his shirt; whereupon the said Wilson and Hall, or one or other of them, entered into the said room and carried off a pocket-book containing bank notes, and also gold and money in his possession to the value of L.200 Sterling, besides some other goods, and, when they returned out of the said room, did distribute the goods so taken away at their pleasure.

And against the said George Robertson it is charged, That when Wilson and Hall were committing the foresaid crimes, he the said George Robertson was standing sometimes at the door of the house, and sometimes at the foot of the stair leading to the said house, as a sentinel and a guard, with a cutlass in his hand, to prevent any person from interposing, and did threaten the servants of the house when going towards the door of the Collector's room; and when several of the inhabitants were gathered together upon the streets, having been alarmed by the noise, and were coming towards the door of the said house, inquiring what was a doing there, that he, the said Robertson, in order to persuade them not to enter, falsely affirmed that he had endeavoured to go up stairs, but being in hazard of being shot was obliged to leave the house; and having gone along with these inhabitants to the house of John Hyslop in Pittenweem, that he detained them there for some time till he

judged that his associates might have made their escape with their spoil.

That soon thereafter, William Hall was seized in the street of Anstruther Easter, between the hours of twelve and one in the morning of that same night, having several of the goods so robbed in his possession, which he dropped, and endeavoured to conceal; and that Wilson and Robertson having met some space thereafter in the house of the said James Wilson in Anstruther Easter, when they were informed that the house was beset, they, or one or other of them, did deliver to the said James Wilson some of the things robbed as aforesaid, and immediately thereafter got into bed, where both of them were seized and apprehended; and upon the top of the bed were found the bank-notes robbed from James Stark, and his pocket-book above another bed in the room they went first into when they returned to the said house

And, *lastly*, the libel charges, that the pannels were art and part of the crimes of housebreaking, robbery, and stouthrieff, committed at the time and place foresaid.

Upon the reading of this libel against the pannels in Court, they all denied the same; and the defences that were further offered for them did arise partly from certain facts set forth more fully and truly than what is set forth in the libel, and which therefore it was necessary here to premise.

And, first of all, in opposition to what the libel alleges of Andrew Wilson's having formed a de-

sign to rob the said James Stark, and having taken with him the said Hall and Robertson, his associates, from Edinburgh that morning. It was represented that they did not set out from Edinburgh in company together, but met together upon the water, in the passage between Leith and Kinghorn, where two of them, Wilson and Hall, were passing in a yaul, and the other was crossing in a passage-boat: That instead of leaving Edinburgh, and going to the East Nook of Fife, upon the criminal design libelled, they had each of them lawful business in that part of the country, viz. for buying of goods, which they ordinarily dealt in, and which it was neither criminal nor capital to buy and sell; and particularly George Robertson, who kept an inn in Bristo at Edinburgh, where the Newcastle carriers commonly did put up, and where he was frequently entrusted with valuable goods without ever being challenged for dishonest or theftuous practices, having occasion to buy liquors in Fife, agreed to take share of a cargo with Andrew Wilson, and got a letter of credit from Francis Russell, druggist, directed to Bailie Andrew Waddell in Silverdyke, near Anstruther, for the value of about L. 50 Sterling; and, further, he carried with him an accepted bill of John Fullarton in Causeyside, to the like extent, as a fund of credit for the goods which he might buy, and William Hall, the third pannel, was a poor workman in Edinburgh, commonly attending the Weighhouse, who was carried along to take care of and fetch over the goods.

That, accordingly, as soon as they came to Anstruther, and put up their horses at James Wilson's, they went to Bailie Johnston's in that town, and bought from him goods to the value of £. 46, 10s. Sterling; and whilst they staid in Anstruther, and were making this bargain, drank some quantity of liquor.

That after this, not finding at Anstruther the whole quantity they wanted to purchase, they came on foot to Pittenween, being only one mile's distance, when they first went to the house of Drummond, merchant there, and drank some time with him, desiring to buy some brandy of him, which he sometimes used to sell, but he told them he could not furnish them at that time; and whilst the two pannels, Wilson and Hall, were at Drummond's house, George Roberson went to the house of Alexander Pollock, brewer in Pittenweem, with whom he had an affair to settle, but the people in the house being all in bed, he was not admitted.

That after this, the pannels went into the house of Widow Fowler, where calling for a room, they were caried into the kitchen, and inquired at the landlady if she could furnish them any place for lodging the goods they had bought, and there they drank both ale and punch, till with what they had got before at different places they became all very drunk.

That at this place it was told by the landlady or servants in conversation, that there was money to a considerable value in the next room; and if any part of the facts libelled were committed by the

pannels Wilson and Hall, it was done upon occasion of this accidental information when they were very drunk: As a further evidence of which it appeared, by the libel itself, that they acted like persons in such condition; for they as well as the other pannel Robertson were all seized in an hour or two thereafter, before they had time to come to themselves, and without any of them taking the most rational and obvious measures to make their escape; but instead of that, Wilson suffering the notes to lie open on the top of the bed where he lay, even after he had been alarmed, as the libel alleged, by the house being beset, when any man in his senses, if he could not have concealed the notes, would have put them in the fire, rather than have exposed them and himself in such an open and unguarded way.

That as for the third pannel, George Robertson, he either did not hear the conversation between the other two in Widow Fowler's house, or if he heard it, did expressly dissent or disapprove, or at least nowise concurred, but left the house; and upon his return homewards towards Anstruther, where his horses and quarters were, met upon the street of Pittenweem with two Hillock weavers, upon whose invitation he went with them into the house of John Hyslop in Pittenweem, where after staying with him some time, he left them and pursued his return to Anstruther, where without receiving any part of the stolen goods himself, or delivering any of them to the custody of his landlord, neither of which the libel itself expressly charged on him,

he went to bed, and was there seized soon after, and was then brought to trial for his life, though he was neither charged with taking or receiving any part of the goods stolen, nor with any other acts of accession, but from certain ambiguous circumstances of behaviour, upon which the libel puts the worst construction, though the same was far from inferring necessarily a participation of guilt: And without such manifest and certain acts of accession, no man who was pursuing his lawful or innocent business could be justly convicted of a capital crime.

From this state of the fact, the defences offered for all the pannels, even Wilson and Hall, against which two, or one or other of them the direct fact was charged, were these: *Primo*, That the fact as charged did not amount to the crimes libelled of housebreaking, stouthrieff, or robbery, the two last of which are undoubtedly one and the same, but at most to simple theft, which was not the crime charged: And, *secundo*, That this being the first instance wherein the pannels had been charged with theft, yet notwithstanding the circumstances with which it was attended, the same, though it had been the crime libelled, ought not to be sustained relevant for a capital punishment, in respect to the circumstances of the pannels, and of the fact before recited: That if it was done by them, they were drawn into it suddenly and occasionally, being very drunk, and had no time to come to themselves and offer restitution, because they were seized and all the goods recovered within an hour or two af-

ter; at least the whole, except a part of the money said to have been dropped by Hall in the fields, and which next day he fairly told and directed where it would be found, and it was recovered accordingly.

It was alleged by way of answer to this defence, that it was not material under what name the crime was described in the preamble of the indictment, providing the facts specially charged and set forth therein amounted to a crime capitally punishable: But this answer the pannels apprehended and were advised was by no means sufficient: For it was necessary, in all criminal libels or indictments, that the pannel, and likewise the court and jury, be told what is the nature and name of the crime charged, and it is that crime which is found relevant to infer either a certain punishment or the pains of law due to that crime. And the fact to be tried by the jury is, Whether it be proved or not proved that the pannel is guilty of that very crime with which he is charged? For, otherwise, though it should be proved that he was guilty of a greater crime, he cannot be convicted upon that trial by virtue of such proof, or even a verdict upon it; and yet, according to the doctrine pleaded for the pursuer in his information, if the libel should charge the crimes of housebreaking and robbery, as in this case, and in the subsumption it should be set forth that the pannel had killed a man, which is undoubtedly a capital crime, the libel would be relevant; which was certainly too absurd to be maintained, or to need any refutation: And though the diffe-

rence between robbery and theft be not so manifest, yet the distinction is no less real, and the effects of these crimes in law very different: in so much, that if upon this indictment a verdict should be returned finding it proven that the goods were stolen by any of the pannels, it was, with great submission, conceived, that they could not be condemned or punished upon this indictment with such verdict, because that would not be finding them guilty of housebreaking or robbery, the only crimes libelled, and which were very distinct from theft.

That the fact charged was not housebreaking was insisted for the pannels, upon this reason, that by the libel's own showing they were all once lawfully within the house with the consent of the owner, and had continued there some time drinking, before any of the criminal facts libelled were done; and being once lawfully there, the breaking the door of a room could no more be called housebreaking, than if, being lodged in a room, they had broke up the door of a closet, press, cabinet or other repository within that room, in order to steal or carry off the goods therein contained, all which, though in themselves criminal facts, were yet different from what is truly and properly housebreaking; even as a person quarrelling with the landlord of a house, after he has entered the house lawfully, accidentally or upon invitation, that may be an assault or riot, but is not the crime of hamesucken, which consists of the violent entry into another man's house on purpose to assault him.

And it was no good answer to this, supposing it

should be admitted, " That in terms of the 22d act 1661, homicide committed upon thieves and " robbers breaking houses in the night, and which " is thereby declared shall not be punished by " death, might be extended in favour of a person " who should kill persons breaking into the room " where he lay in a public inn." For, *primo*, That defence might be sustained upon the common principles of self defence, because any person within a room in which he is lodged, if he shall call out to those who are breaking into it, requiring them to desist at their peril, and if, notwithstanding this, they persist in their violence, he may have reason to apprehend the worst for himself, and may justly be excused upon the laws of self defence, though he should kill them: Or, *secondly*, upon the just interpretation of that statute, extending the same favourably in behalf of defenders, it might be admitted, that a person within a room which is assaulted, might have good reason to look upon the invaders as housebreakers, because he could not know but that in like manner they had broke into the house itself: but the law was not to be extended against the pannels, as it might be for them, it being a maxim of justice, *in dubio pro reo*; and the question was here, whether the prosecutor could insist, whether persons lawfully, and by consent of the owners within a house, and thereafter breaking the door of a room, were guilty of housebreaking or forcibly breaking into a house?

And as to what was said, that the room where-

in the Collector lay was his house for the time, that could not be alleged with any propriety; and it was begging the question, without any authority to maintain it, to pretend that hamesucken could be committed by entering barely into a chamber where a person lodges in an inn; which occasional lodging does not render it his house, for he is not an inhabitant there; he is but a stranger or an inmate, as it is rendered in the law of England, where this crime of housebreaking with a felonious intent receives the particular name of burglary; and it is resolved, that in order to make a lodging the mansion house of the lodger, it is necessary that his lodging be separated by a lease from the rest of the house, and even then it is doubtful, unless he have a separate door to the street. Hawkins, h. t. § 13, and 15.

As to the other crime charged of stouthrieff or robbery; it was for the pannel insisted, that the fact libelled could not be robbery, because the libel itself bears, that before they entered the room, James Stark was gone out of it, so that they saw no person, nor did he see them; and it was an empty room into which they were said to have entered; neither was it alleged that they were armed; and it was said that there were pistols in the room, which was another evidence of their drunkenness and want of premeditation in any criminal or irregular act which they might have fallen into.

The pannels have not proved that stouthrieff and robbery were different crimes, but the contrary, by Sir George Mackenzie's definition of the

former as being a stealth committed with violence, or, what the Doctors call robbery or rapine; and accordingly, he treats it under the title of robbery and not of theft, and says, that by this crime of stouthrief and robbery our persons are endangered as well as our estates, and so is ordinarily punished by death even in those countries where theft is only punishable by pecuniary mulcts or whipping, and thus it was punished with death among the Jews, as is clear by David's answer to Nathan's parable: "Though theft was only punished by restitution, and that by the custom of "all nations, robbery is punished with death, "though it be not reiterated." And this was mentioned in respect to what he had formerly observed in the title Theft, That by the laws of most countries theft is not capital till it be reiterated, so far as the third time, which he gives as his own opinion as what ought to be followed among us. And it was for this very reason, of the great difference betwixt the effects of these crimes, that the pannels did humbly insist upon the distinction, and that the facts charged against them did amount to theft only, and not to robbery.

It is the very essence of robbery that the goods be taken by force, either from the person who is the owner or possessor thereof, or at least under his eye and in his presence; so robbery is defined by Hawkins, § 3. of that title, to be a felonious and violent taking away from the person of another goods or money to any value, putting him in fear, and therefore, § 8. he shows how far this may

be extended, viz. That the taking of any thing from a man openly and before his face, which is under his immediate and personal care and protection, may properly enough be said to be a taking from the person, but still this cannot be extended to make that robbery which was taken out of an empty room where no person was when they entered into it.

The text cited for the pursuers, Law 2. cap. 23. *Vi bonorum raptorum*, is entirely foreign to the present question; for it concerns only the interest which the pursuer must have in the goods, in order to entitle him to this action; and the law says, that whoever could pursue the action of theft if the goods were stolen, may pursue the action of robbery if the goods were robbed. But surely the pursuers did not mean to prove by this that there is no distinction betwixt the two actions or crimes, and that even where goods are secretly stole, an action or prosecution of robbery doth lie.

And as little was it to the present purpose to quote the case of Macgibbons in the year 1676, where a libel was found relevant without condescending upon the persons from whom the goods were robbed, nor what goods were robbed, but only in the general, that the pannel did frequently rob the houses of Grantully and Strathurd's tenants; a precedent which, it was believed, the Court would not at this day follow, even where the same reason alleged for support of it, which Sir George Mackenzie reports, namely, that the pannels were charged with a habitual and constant trade of robbing and sorning.

As to the case of George Robertson, in particular, the acts of accession, even as they are libelled against him, were neither relevant nor consistent with one another. It was not said that the persons in the house whom he hindered to go towards the door of the room, were going thither to prevent any damage being done; so that, for any thing in the libel contained, the hindering other persons to enter the room might have been for defence of the room itself, and to prevent their concurring and assisting to plunder it.

It is not said that the inhabitants gathered together upon the streets, did come, or attempt to come, to save or rescue what was contained in that room, and, on the contrary, it was admitted, on debate by the pursuers, that the inhabitants of coast towns are not very ready on these occasions to lend their assistance to the officers; and if George Robertson had truly said to the persons whom he met on the street that he was by fear obliged to leave the house, it might very possibly have been true, and an argument of his innocence, and therefore ought not to be turned into a circumstance of his guilt; for if one, even of four, (for there was a third person with the other two pannels,) finding his companions in their drink entering upon a criminal fact, shall still have so much sense left him as to withdraw and leave them, he might very justly apprehend and believe it dangerous to come in their way, or seem to stop the execution of what they were about; more especially that the persons he met upon the street, and who the libel represents as if it had been

a multitude assembled, were nothing more than the two weavers who carried him into Hislop's house, which was further east the street in the way to Anstruther, where he was going home.

And this behaviour, again, was very inconsistent with the notion of his acting as a sentinel with his cutlass, in order to guard the other pannels from being prevented, either by people in the house, or others in the town, from executing their purpose; so that the whole circumstance of this accession libelled, were nothing but what the most innocent man, in his circumstances, might have said or done, and were only strained by the libel into the worst sense, to make them appear criminal by construction, and by affirming his bad intention in his own mind by these expressions, that he treacherously endeavoured to persuade the persons he met not to enter the house, and that in order to keep them still amused with false pretensions of danger, he went along with them to Hislop's house, *i. e.* with the two weavers, for this was all the mob with whom he was in company, besides whom there were enough in the town to have made their rescue, whilst he, the said Robertson, was in Hislop's house, without taking any care or watching the pannels.

And as for his going back to the house in Anstruther where he had left his horse, and being found thereafter in the same bed with one of the other pannels, none of these wee surely acts of guilt or accession of guilt; for to what place should he go at that time of night to lodge, but to the inn where he left his horse, in the town where he had bought

his goods? If he had run away to another place, his flight would have been a better argument for suspicion against him; and if his landlord put another person, whom he had seen in another company, into the bed with him, surely that would not infer that he was partner in all the crimes which his bedfellow might have committed the day preceding. These were acts and circumstances of accession which might have been incident to the most innocent man living.

And as this conduct of his was, at the worst, doubtful and ambiguous only, and capable of a good and innocent, as well as a bad or malicious construction, it was not doubted that the Honourable Court would do him the justice to allow him, for his exculpation, to bring a conjunct proof of the circumstances of his behaviour at the time of the facts libelled, that the guilt or the innocence thereof might appear.

And, lastly, as to the whole pannels. As the facts charged upon them, either as actors or accessories, amounted only to theft, and not properly either to housebreaking or robbery, it was for them humbly pleaded, that being the first accusation of theft against them, the libel should either be not at all sustained relevant, because that crime is not charged, or, that it should be restricted to an arbitrary punishment, not only as being the first instance, but in respect of that circumstance which they offered to prove for alleviation, that they were all very drunk when the criminal facts libelled happened.

This was what the most approved authors upon

criminals have admitted as an alleviation to excuse from the ordinary punishment, without distinguishing whether it was anger or any other passion that was excited by occasion of drunkenness; and even Matthæus, whom the pursuers quoted for proof of the contrary, admits the same thing: his words are, Prolegom, cap. 2. *Prope finem nunc vero ut verbo absolvam, quantum ad ebrietatem attinet, non displicet distinctio vulgata inter ebrios et ebriosos; ebrius aliquo mitius puniri potest, quia non proposito sed impetu delinquit, L.* 11. *ff. delinquitur de poenis, L.* 6. *ff. pr. vinum de re militari;* and it was the words which he afterwards has concerning the *ebriosi*, which the pursuers were pleased to quote, as being the severest part of the alternative.

But this matter is more fully handled by the learned Carpsovius, who has an express title upon this subject, Part 3. Quaest. 146. *An et quatenus ebrietas delinquentem a poena ordinaria excuset*, and he lays it down as a rule, *Pono regulam, quod ebrietas immodica delinquentem a poena excuset ordinaria, quae regula unanimo ferme interpretum calculo approbata est juribus, et jurisperitorum, canonistarum, theologorum aliorumque plurium auctoritatibus, rationibus et exemplis exornata;* and as to the practice of his own country, he adds, *Secundam hanc regulam quotidie pronunciant Scabini*, and of this gives several examples or decisions. And as to those whom Matthæus calls *ebriosi*, and who are not entitled to the benefit of this rule, he describes them justly in these words, *Num scilicet quis sciens se solitum in ebrietate delinquere non abstinuerit avini immodica*

potatione, et se inebriaverit, cum poenam ordinariam vix effugere posse tradunt; and thereafter he adds another limitation of this rule, which the pannels had no opportunity to fall under, viz *ut procedat solum in eo quem in se reversum, et ebriositate cessante, poenitet delicti in ebrietate commissi; secus si de eo glorietur, quia tunc ratificatione subsequuta apparet, quod eodem modo deliquisset si non fuisset ebrius, ideoque tum merito poena ordinaria puniendus est.*

But in the case of these pannels, within an hour after the fact happened, and before any of them had time to come to themselves, they were all seized, and the goods recovered; so that they had no opportunity to discover their repentance upon their becoming sober, being taken into custody while they were yet drunk. But if in any case this rule, which is so universally received upon such undoubted authorities, ought to be followed, it should be in the case of the first instance of theft, to serve as an alleviating circumstance, in opposition to other circumstances that were aggravating, and to prevent that first offence where the damage was entirely restored, from being sustained to take away the lives either of three or of two men.

There were no circumstances libelled exclusive of this defence, or inconsistent with it. For the facts libelled might have been committed by persons very drunk, and their after behaviour served for a proof that the pannels were so. For it was somewhat strange that the pursuers should allege in their information, that the bank-notes and pocket-book were carefully put out of the way, when the very li-

bel bears, that these things were found on the top of two several beds in the house, where none but drunken men would have left such things, though they had been their own property or lawfully in their possession; and besides these strong probabilities, the pannels offered a positive proof of their drunkenness at the time libelled.

In respect whereof, the pannels did humbly crave, that the Court might find, 1*mo*, the libel not relevant to infer the crimes libelled of housebreaking, stouthrieff, and robbery; or, 2*do*, that the same was not relevant against George Robertson, who was not directly charged either as actual taker or receiver of any part of the goods libelled; or, at least, 3*tio*, to restrict the libel to an arbitrary punishment, in respect of the defences and exculpation offered for the whole pannels, That they came occasionally to Pittenweem, in the course of their lawful business; that it was the first offence, and that they were all very drunk at the time, and both they and the goods seized before they would have time to recover; and for George Robertson, in particular, that he left the house of Widow Fowler before the facts libelled were committed, and to allow him a conjunct probation of his behaviour on that occasion.

(Signed) WILLIAM GRANT.

CURIA JUSTICIARIA S. D. N. Regis, tentâ in nova Sessionis domo burgi de Edinburgo, nono die mensis Martii 1736, per honorabiles viros, ANDREAM FLETCHER de Miltown, Justiciarium Clericum, Dominum JACOBUM MACKENZIE de Roystoun, Magistrum DAVIDEM ERSKINE de Dun, Dominos GUALTERUM PRINGLE de Newhall, et GILBERTUM ELLIOT de Minto, et Magistrum ALEXANDRUM FRASER de Strichen, Commissionarios Justiciariae dict. S. D. N. Regis.

Curia legitime affirmata,

Intran. ANDREW WILSON, WILLIAM HALL, and GEORGE ROBERTSON, } *Pannels.*

INDICTED and ACCUSED, as in the former sederunt.

The Lord Justice-Clerk and Lords Commissioners of Justiciary having considered the indictment pursued at the instance of Duncan Forbes of Culloden, Esq. His Majesty's Advocate for his Highness' interest, against Andrew Wilson, William Hall, and George Robertson, pannels, with the foregoing debate thereupon, Did find, That the said pannels, or any of them, having, time and place libelled, by violence broke into the room where James Stark, Collector of Excise, was lodged, or that they or any of them did carry off bank-notes, gold, silver, or other goods out of the said room, or that they, or any of them, were art and part of any of the said crimes, *separatim* relevant to infer

the pains of law; but allowed George Robertson, pannel, to adduce what evidence he could, with respect to his behaviour the time when the foresaid crimes were committed, for taking off the circumstances which should be brought for inferring his being accessory, or art and part of the crimes libelled; and repelled the haill defences proponed for the pannels, and remitted them and the indictment as found relevant to the knowledge of an assize. (Signed) AND. FLETCHER, *I. P. D.*

The Lord Justice-Clerk and Lords Commissioners of Justiciary continued the diet at the instance of His Majesty's Advocate against Andrew Wilson, William Hall, and George Robertson, pannels, till the morrow at nine o'clock forenoon, and ordained parties, assizers, and witnesses, then to attend, and the pannels to be carried back to prison.

CURIA JUSTICIARIA S. D. N. Regis, tenta in nova Sessionis domo burgi de Edinburgo, decimo die mensis Martii 1736, per honorabiles viros, ANDREAM FLETCHER de Miltown, Justiciarium Clericum, Dominum JACOBUM MACKENZIE de Roystoun, Magistrum DAVIDEM ERSKINE de Dun, Dominum GUALTERUM PRINGLE de Newhall, et GILBERTUM ELLIOT de Minto, et Magistrum ALEXANDRUM FRASER de Strichen, Commissionarios Justiciariae dict. S. D. N. Regis.

Curia legitime affirmata,

Intran. ANDREW WILSON, WILLIAM HALL, and GEORGE ROBERTSON, } *Pannels.*

Thereafter, the Lords proceeded to make choice of the following persons to pass upon the pannels' assize:

John Ogilvie, skinner in Edinburgh,
John Paton, bookseller there,
David Brown, merchant there,
Robert Kirkland, merchant there,
James Lindsay, merchant there,
William Rankin, wright there,
John Hope, merchant there,
James Rob, merchant there,
David Spence junior, merchant there,
Alexander Brown, merchant there,
William Gellatly, merchant there,
David Baird, merchant there,
Charles Blair, goldsmith there,
John Allan, baxter there,
David Oliphant, bookseller there.

The above assize being all lawfully sworn, and no objection of the law in the contrair,

The pursuer, for proving his libel, adduced the witnesses after deponing, viz.

JAMES STARK, Collector of Excise at Kirkcaldy, aged forty-nine years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, depones, time and place libelled, the deponent being then upon his collection as Collector of Excise, he went to bed about

ten o'clock, and about an hour and a half thereafter he was waked out of his sleep by a noise and some chapping at the door of the room where he lay, which door he had secured before he went to bed by screwing down the sneck of the door, which noise the deponent at first imagined was occasioned by some drunken people in the house; but afterwards, upon the strokes on the door being repeated with violence, the deponent jumped out of his bed, and heard the under part of the door of the bed-room giving way, upon which the deponent laid hold upon two bags of money, which, with the deponent's breeches, in which were about L. 100 in gold and bank-notes and silver, the deponent had put below his head when he went to bed; and the deponent did then, in the confusion in which he was, put the table and some chairs to the back of the door to stap up the gap, and thereafter opened the window, and returning to find the bags of money and his breeches, he could only find one of the bags of money, and being then in fear of his life he jumped out at the window, with one of the bags of money, and fell at the foot of the stair, the said window being just above the entry to the house, and recovering himself a little he went towards the corn yard, and hearing a person call out, Hold him, the deponent apprehending the voice to be before him, he returned a few paces, and then perceiving a man standing or walking at the foot of the stair, the deponent returned again to the yard, where he hid the bag of money, and thereafter coming back towards the house to hear what was a-doing, the de-

ponent heard a knocking in the room where he had been lodged, and thereupon retired to the yard again, lay covered with some straw till about four in the morning, and then returning to the house he saw the pannel, William Hall, in custody of some soldiers; and the deponent having said to him that he had given him a cold-bath that night, William Hall answered that he was not to blame, being only hired, and had no hand in it, but that Andrew Wilson and George Robertson had come there of a design to rob the deponent that night, and that this design had been framed several months before by Andrew Wilson, and particularly at the preceding collection at Ely: And further depones, That soon after the deponent got out of the window as aforesaid, he heard the clock strike twelve: That when the deponent was first awakened out of his sleep as aforesaid, he heard Mrs Fowler, the landlady, call to the persons who were breaking open the deponent's bed-room, What are ye doing, or why do ye this? and the deponent heard them at the same time cursing and swearing and making a great noise; and the deponent having only carried one bag of money along with him as aforesaid, he left in said bed-room the money and goods following, viz. the deponent's breeches, in which was a purse with fifty-two and a half guineas, betwixt six and seven pounds in silver, and a pocket-book with one and forty pound in bank-notes, which purse and pocket-book the deponent exhibits in court: That besides the bank-notes there were several bills and other papers in the

pocket-book, and that there was likewise in the deponent's breeches a seal and a pair of silver shoe buckles, a penknife, which the deponent likewise exhibits. The deponent likewise left in his room a cloak-bag with some linens in it, which cloak-bag the deponent likewise exhibits in Court; as also, a bible, a pair of pistols, which the deponent likewise exhibits: That upon the deponent's returning to his room, as aforesaid, he found the door of the room broke in the under part, and saw a press in the room which had been broke up, and found his breeches empty, and all the several particulars before enumerated amissing; and thereafter, about seven o'clock in the morning, the deponent having gone to Anstruther Easter, he soon thereafter saw the three pannels in custody; and the deponent did then see in the hands of the magistrates of Anstruther the seal, the buckles, and penknife above mentioned. Depones, That upon Monday following, being the 12th of January last, William Hall, pannel, told the deponent that he had informed Alexander Clerk, Supervisor of Excise, where the purse of gold was to be found, whereupon the deponent desired the Supervisor to go in quest of it, which the said Clerk brought to the deponent's house, at least he believes he did so, because Clerk told him so, and he actually got the purse with the whole gold in it; and that the bible above mentioned was returned to the deponent by one of the soldiers who seized William Hall, pannel: That on Saturday night the 10th of January the deponent got back his pocket-book and bank-notes with the other pa-

pers in the said pocket-book from Bailie Robert Brown in Anstruther Easter. *Causa scientiæ patet.* And this is the truth, as he shall answer to God.

(Signed) JA. STARK.
AND. FLETCHER.

ALEXANDER CLERK, Supervisor of Excise at Cupar in Fife, aged thirty-four years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, depones, time and place libelled, the deponent was lodged in the room next to Collector Stark, and went to bed about ten, and as the deponent afterwards found was wakened about twelve o'clock at night by a noise of persons rapping either at the door of the room the deponent was in, or at that of the Collector's, and heard a cry of Murder the dogs and burn the house; upon which the deponent swore that the first man that came in, he would put a pair of balls in him, and was answered that they had pistols and swords as well as he, which he should soon find. The deponent then put on his breeches, and got out at a window at the back-side of the house, and without any other clothes walked to Easter Anstruther about a little mile, and awakened the serjeant who commanded the party there, and with the said serjeant and two of the soldiers set out for Pittenweem, again leaving orders for the rest of the party to follow: and as they passed the entry of Sir John Anstruther's house in Easter Anstruther, they met with some men, who having challenged the deponent, 'Who comes there?' the deponent desired

them to give an account of themselves, and upon their running off, the deponent ordered the soldiers to seize them, upon which the serjeant with his halbert hooked one of them, the rest escaping, which afterwards appeared to be William Hall the pannel, and whom the deponent carried along with him to the Excise Office at Pittenweem; and having brought him into the house of Mrs Fowler, Jean Finlay, servant to Mrs Fowler, upon seeing the said Hall, said, This is the villain that broke my head a little while ago; and Thomas Durkey, likewise another servant in the house, said, This is one of the persons who robbed the Collector the night; and the soldiers who brought Hall produced a bag of linen and a bible which they said they had taken, as Hall dropped it by the way; and William Geddes, clerk to the Collector, did then say, This is the Collector's bible, and these are his linens, whereupon Hall confessed that he had been guilty of robbing the Collector; and the deponent there upon telling Hall that he was now in for it, and that the best way was for him to discover the rest, which if he would do the deponent would do his endeavour to get him made an evidence, and being asked if he then promised to get him a pardon? depones, That he understood it so, but does not remember that he mentioned the word *pardon*: upon which the said Hall told the deponent he would get these other persons whom he named; remembers particularly that he named Andrew Wilson, pannel, to have been one of them: That they had come upon four horses that morning from Kinghorn,

and that he would find them all in the house of James Wilson in Anstruther Easter, or in a house twenty yards on this side of it, which the deponent understood to be Bailie Andrew Johnston's. By this time the rest of the party having come up from Anstruther, the deponent made some search for the Collector, but could not find him, and thereafter the deponent carried up Hall to the room where the Collector had lodged, the door of which he saw broken in the under part, and left Hall prisoner there in custody of some of the soldiers and of the rest of the party, and Thomas Durkey and the above William Geddes. The deponent went to Easter Anstruther in search of the rest of the robbers, and having beset the house of James Wilson there, he found three men in bed in a room there, viz. Andrew Wilson and George Robertson, pannels, and one John Friar; and having shewn them to the above Thomas Durkey, he, the said Thomas declared, that the said Andrew Wilson and George Robertson were two of the persons that had robbed the Collector; upon which the deponent having applied to the Magistrates, he got them committed to prison; and that upon seizing the said Andrew Wilson and George Robertson as aforesaid, the deponent and the said William Geddes searched the room and bed where they were lying, but could find nothing. And depones, That at the time and place foresaid he knew the Collector had in his custody that night when he went to bed a considerable sum in gold money and bank-notes, as also a cloak-bag, and the pistols now exhibited in court; and

depones, That as the pannels were carrying prisoners to Edinburgh, while they were at Kirkcaldy, the deponent asked George Robertson pannel what was become of the Collector's purse of gold, to which George Robertson answered, that Andrew Wilson the other pannel told him that William Hall got the purse; upon which the deponent inquired at Hall about it, and told him that unless he confessed and discovered where the purse was, he could not expect the promises he had made would be kept to him; and after some entreaty, the said William Hall pannel told the deponent that he had dropped it upon his being seized in a wet furr near a dunghill; and accordingly the deponent went to Pittenweem, and upon application to a Magistrate, and in his presence, the purse was found in the very spot described by said Hall, with fifty-two guineas and a half in it, and the purse exhibited in court being shewn to the deponent, he thinks it is the very purse: And further, depones, That upon Hall's being seized as aforesaid, and brought to Pittenweem, he told the deponent that the persons who had robbed the Collector had come on that very purpose from Edinburgh, and that Andrew Wilson pannel had designed it six weeks before: And depones, that he heard Andrew Wilson say, in presence of His Majesty's Solicitor, a few days after he was brought to Edinburgh, that he had been guilty of the foresaid robbery of the Collector, but denied that he had any design before that time of

robbing the Collector. *Causa scientiæ patet.* And this is the truth, as he shall answer to God.

(Signed) ALEX. CLERK.
AND. FLETCHER.

WILLIAM GEDDES, clerk to Collector Stark, a former witness, aged twenty years, or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, depones, That upon the 9th of January last Mr Stark, Collector of Excise, lodged in the house of Mrs Fowler in Pittenweem, and went to bed about ten o'clock at night, and Alexander Clerk, Supervisor of Excise, and the deponent, lay in the next room to him, and after they were in bed they heard some people beating with violence at the door of Mr Stark's room, and heard them several times cry, Burn the house and burn them alive; and the door of the room where the deponent was lying being open, he saw some people go into the Collector's room, which is opposite to the room where the deponent lay, and saw them get in at the lower part of the door which was broken, but could not see them so distinctly as to know who they were; and saw them come out of the room with a cloak-bag and a pair of pistols in their hands. And being interrogate, What time of night this was? depones, To the best of his knowledge it would have been about eleven or twelve o'clock; and to the best of his knowledge, he believes the said persons did not stay in the said room above ten minutes or fifteen at furthest; and that while this was a-

doing, he heard the mistress of the house and her maid making a noise in the passage to the door of the Collector's room, and that one of them had a candle in their hand. Depones, That after he saw the persons come out of the Collector's room as aforesaid, he rose up and went into the Collector's room, and saw all things in confusion, and the papers relating to the revenue lying scattered up and down the room: That the deponent went into the room at the lower part of the door which was broken, and where he had seen the men come out and go in at; and the landlady and maid of the house went into the room with the deponent, and he the deponent saw the Collector's breeches, which he riped and found empty, and found a bag of money among the bed-clothes, which had been pulled out of the bed and lying on the floor, and knew the bag of money to be the Collector's. Depones, That some time thereafter Mr Clerk the Supervisor came back to the house, bringing along with him William Hall pannel, and a serjeant and two or three soldiers guarding him: That one of the soldiers had the Collector's bible and some of his linens with him, which he the said William Hall had dropped by the way when they first seized him on the way from Anstruther. Depones, When William Hall was brought into Mrs Fowler's house, the servant-maid Jean Finlay said, That he was the man that had broken her head a little before. Depones, That upon Mr Clerk's asking William Hall who were the other persons that had robbed the Collector, and broke open his door; Hall answered, that they were some people that had been losers

by brandy, and particularly named Andrew Wilson in Pathhead, George Robertson, stabler, and one Galloway, an horse-hirer in Kinghorn, and that he (Hall) and Galloway had come along with the other two as their servants, and had brought four horses along with them from Kinghorn; and Hall further said he believed they would find the said Andrew Wilson and George Robertson either in the house of Andrew Johnston or James Wilson in Anstruther Easter: That accordingly the deponent went along with Mr Clerk and some soldiers to Anstruther, and Thomas Durkey, servant to Mrs Fowler: That they there found Andrew Wilson and George Robertson, pannels, in bed, in James Wilson's house: That George Robertson and one Friar had their clothes off, but Andrew Wilson had on his breeches and a girdle about him. Depones, The night that this happened he knew Collector Stark had in his custody gold, silver, and bank-notes, but to what quantity he does not know. Depones, That the pocket-book, pistols, seal, penknife, buckles, now shewn to the deponent, were in the Collector's possession that night that he was robbed. Depones, As the deponent and the Collector were coming from Pittenweem to Anstruther, Galloway, who was in the custody of two soldiers, told them where to find the cloak-bag and the pistols now produced: accordingly, they did find the cloak-bag and one of the pistols there. Depones, When they found Wilson and Robertson pannels in bed, as before mentioned, they found none of the goods belonging to the Collector there, nor in their

pockets, which the serjeant searched. *Causa scientiæ patet.* And this is truth, as he shall answer to God. (Signed) WILL. GEDDES.

JOHN GALLOWAY, servant to Patrick Galloway, horse-hirer in Kinghorn, aged 26 years or thereby, unmarried, solemnly sworn, purged of malice and partial counsel, examined and interrogated, depones, That the time libelled William Hall, pannel, came to the deponent's master's house in Kinghorn, and desired him to get two horses, one for himself and one for the deponent, telling him that they were going to Anstruther to get some brandy, and that George Robertson and Andrew Wilson, pannels, were to be their masters and pay the expense; and desired the deponent to go to the houses where they then were: the deponent having gone accordingly, and spoke to the said persons, George Robertson desired to get their horses ready, and Hall and the deponent to go before and they would overtake them; that about six o'clock at night they came to Anstruther Easter, and set up their horses in James Wilson's house, where he found Andrew Wilson pannel, who was there before him; and after they put up their horses, they went to Andrew Johnston's there, where they got Robertson and Wilson, pannels, drinking punch. Depones, That William Hall and the deponent had got orders, in coming from Kinghorn, not to keep company with Wilson and Robertson, but to take another road to Anstruther. Depones, That the three pannels and the deponent went from Anstruther to Pitten-

ween on foot betwixt ten and eleven o'clock at night. Depones, That when they came to Pittenween, he the deponent, Hall and Wilson pannels, went into a house, but does not know the name of the landlord, where they drank a bottle of ale, and it was agreed that while they were there Robertson the other pannel should walk on the street: That when they came out of that house the three pannels and the deponent went to Widow Fowler's house, where they drank some ale and brandy: Andrew Wilson having asked the landlady if she could lodge any casks of brandy for him, she desired him to speak low, because the Collector was in the house; upon which Wilson said, Is he here? She answered, He was. Robertson the pannel called for a reckoning, and all four went down stairs, at least went to the stair-head. Robertson, Hall and the deponent went out to the street, and as the maid was going to shut the outer door, Andrew Wilson pannel pushed it open, and went in, upon which the deponent and William Hall went in, and George Robertson pannel drew his cutlass and stood at the outer door, saying that no person should go out or in of that house but upon the point of that weapon. Depones, When they went into the house they saw Andrew Wilson pannel standing at the door of the room where the Collector was lodged, and the lower part of the door broken: That before he the deponent went up stairs, he heard a knocking and beating, but did not see Andrew Wilson beat the door, it having been broken before he the deponent came up stairs:

That upon seeing the door broken, he the deponent asked Wilson what he meant, or what he would be at; to which Wilson answered that he had lost a great deal of money by the public, and understood that there was some of it there, and was resolved to have it back again; upon which the deponent said to him, that he would have nothing to do in the matter; to which Wilson answered, that if he should go away and leave them, the first time he met him he should be a dead man; and the deponent offering to go out at the door, George Robertson, pannel, pulled to the door and would not let him out; and a little before he the said George Robertson gave the deponent a pistol to hold in his hand. Depones, That after the door of the Collector's room was broken open as aforesaid, Andrew Wilson, pannel, went into the room and brought out a pair of breeches; and shewing them to the deponent said, Here is a good deal of money; the deponent telling him he would have nothing to do with it, the said Andrew took out several handfulls of money and put into the deponent's pocket, which money, except a few shillings, the deponent delivered back to the said Andrew Wilson, in the house of James Wilson in Anstruther. Depones, That Andrew Wilson the pannel went again into the room and brought out a cloak-bag, which he desired the deponent to carry, which he refused to do; the said Andrew carried the cloak-bag himself till they came to the end of the town, together with a pair of pistols, which he then delivered to William Hall, pannel, who carried it

half way to Anstruther, and then Andrew Wilson desired Hall to set it down, that they might see if there was any bank-notes in it; and Hall having opened the cloak-bag, took out some linens and a bible which he stowed about himself: That while they were upon the road to Anstruther, William Hall, pannel, shewed the deponent a purse with something in it, which the deponent having desired him to give him or shew him, but Hall refused, and said, Whatever was in it he should share it. Depones, That when they came to James Wilson's house in Anstruther, Andrew Wilson, pannel, took out of his pocket a seal, a pair of buckles and a penknife, which are the same now exhibited in court, and which things he offered to John Friar, whom they found in Wilson's house; but he refusing to take them, he gave them to James Wilson the landlord and desired him to keep them: That at the same time he saw Andrew Wilson, pannel, take out of his pocket the pocket-book now produced, out of which he took several bank-notes and put in his pocket, and then threw the pocket-book on the floor: That while they were in Wilson's house, George Robertson, pannel, came into the room where they were, and told them, that whilst the other pannels were in Widow Fowler's house, that several men and women came to the door whom he hindered to go in, and carried them away to another house to drink. Depones, That Andrew Wilson, pannel, and the deponent went out of Wilson's house, and threw one of the pistols and some linens which they had brought from Pitten-

ween in among some straw in a barn-yard; thereafter, the deponent, Bailie Thomas Brown, and some soldiers, went to the place where the cloak-bag was left, and to the barn-yard where the pistols and linen were thrown, where they were all found, which pistol and cloak-bag are now produced in Court. And being further examined, Whether or not Andrew Wilson, pannel, was long enough in the house before he the deponent came in, to break open the door of the Collector's room, as before mentioned? depones, That in his opinion he was, and heard the noise and beating before he came in, as before mentioned, the mistress and maid of the house being crying and greeting in the meantime: That there was light in the kitchen. Depones, That as Wilson and Hall, the pannels, and the deponent, were on the road from Pittenween to Anstruther, a little to the west of Sir John Anstruther's house, they met Mr Clerk the Supervisor and some soldiers, who having challenged him who they were, one of the soldiers seized Hall with his halbert, upon which Andrew Wilson and the deponent made their escape. Depones, That the cutlass now produced is the same that George Robertson had in his hand, at Widow Fowler's house. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. And depones, he cannot write.

(Signed) Ja. Mackenzie.

Thomas Durkey, servant to Margaret Ramsay, relict of Andrew Fowler, Excise-office keeper

in Pittenween, aged twenty-six years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That the time libelled, and on that night when Collector Stark's room was assaulted, there were in Mrs Fowler's house all the three pannels; and betwixt eleven and twelve o'clock at night, after the Collector was in bed, Andrew Wilson, pannel, did with violence break open the lower pannel of the door of the Collector's room, at which time he did observe George Robertson come down the stair; thereafter, he did not for some time see him nor observed him about the house; but before using of violence upon the door, all the three came down the stair: But immediately thereafter, the said Andrew Wilson, pannel, upon the deponent's shutting to the outer door upon them, he Wilson did violently rush in and went to the door of the Collector's room, and was immediately followed by Hall the other pannel, who beat the deponent. Deponed, That he thereafter did see the said Hall brought to the house as prisoner by the Supervisor and some soldiers, and did observe one of the soldiers deliver the bible in Court, and some linen that the soldier said he had took up on the road, and were dropped by the said Hall; and at that time he did hear Hall acknowledge that he was one of those that were guilty in robbing the Collector that night, and that he did direct the Supervisor to the place where his accomplices were to be found: In consequence whereof, the Supervisor went to Easter Anstruther, with whom the depo-

nent went alongst, and in the house of one James Wilson in that town they found Andrew Wilson and George Robertson, the other two pannels, in bed. Deponed, That after the Collector's room was thus assaulted, the deponent attempted to go out at the outer door, which was then open to the streets, in order to have called upon people to the Collector's relief, but was hindered in his attempt by whom he knew not, and was then forced to jump out at a window: Thereafter, after having endeavoured to get some persons to the relief of the Collector and his effects, but before he returned, the committers of the fact and robbery were gone. *Causa scientiæ patet.* And this was the truth, as he should answer to God. And declared he could not write.

(Signed) D. Erskine.

Jean Finlay, servant to Margaret Ramsay, Excise-office keeper in Pittenweem, aged twenty-four years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, On the day libelled, Collector Stark was assaulted in her mistress's house, the three pannels were there that night, and came in about eleven o'clock at night, and after sitting about half an hour, they went all three down the stair; and the deponent did soon thereafter observe Andrew Wilson, pannel, return, and thereupon did fall a-beating at the door of the Collector's room till such time as he did break open the under pannel thereof, and with him did return some others.

whom the deponent did not distinctly know, which persons were standing by Wilson at the time he was beating at the door. Thereafter, the deponent did go down a trap to her mistress's cellar, and when there, and attempting to come out, she was threatened by some one or other whom she did not see or know, that if she came out he would stick her. Deponed, That though she did not know the persons that returned with Wilson particularly, yet she believed that they were a part of the same company that were together drinking with Wilson before they came down stairs. Deponed, That after the door of the Collector's room was broke up, as said is, she did observe two men, whom she believed to be Wilson and the other person that went with him into the room, carrying out of it a cloak bag, and a pair of pistols and breeches; and did particularly observe them riping the said breeches; and before the deponent went to the cellar, as said is, the said Andrew Wilson, pannel, had made open the room door, and he and the other with him had gone into the room; and after she returned from the cellar she observed them carrying out the particulars before mentioned, deponed, That during all this time the outer-door of the house was open; but the deponent, when attempting to go out thereat was hindered by some people standing upon the stair without the door, whom she believed to be a part of the same company that had been drinking with Wilson, as before said. *Causa scientiæ patet.* And this was the truth,

as she should answer to God; and declared she could not write. (Signed) DA. ERSKINE.

JAMES HILLOCK, weaver in Pittenweem, aged twenty-three years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That night that Collector Stark was robbed in Mrs Fowler's house, the deponent being on the streets of Pittenweem, met with George Robertson, pannel, whom he saw coming from Widow Fowler's house; and the said George Robertson said, that coming up the street he heard a noise in that house, which occasioned his going up to see what it was, and the deponent and he going into another house to take a drink of ale, the deponent desired his brother, who was with him, to go and see what that noise was in Widow Fowler's house; but the said George Robertson dissuaded him to go, by saying he would meet with a mischief, and the said George Robertson said he had been drinking a bowl of punch in Alexander Pollock's house in Pittenweem. Deponed, That the said George Robertson also said that he had left his horses in Crail. Deponed, That when the deponent first met with George Robertson, the pannel, after he had come down Mrs Fowler's stair, he said he had been beat down the stair by a woman in the house. And being interrogated, If he had seen the cutlass which was lying on the table exhibited before? deponed, He saw it that night about George Robertson when he was with him in Hislop's house. Deponed, That he further

added, when he came down from Mrs Fowler's house, he was afraid of bodily harm. Deponed, That when the deponent had met with George Robertson, pannel, on the street as mentioned, he was invited in by the maid of Hislop's house, and likewise desired George Robertson, pannel, to come in; and when they were in the house, the landlady dissuaded the deponent and his brother to go out to Mrs Fowler's house. Deponed, That he saw George Robertson go out of Hislop's house, and went eastward away from Mrs Fowler's house towards Easter Anstruther. *Causa scientiæ patet.* And this was the truth, as he should answer to God.

(Signed) JAMES HILLOCK.
WA. PRINGLE.

LEWIS HILLOCK, weaver in Pittenweem, aged eighteen or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That the night that Collector Stark was robbed, he saw a man come down Mrs Fowler's stair with a cutlass about him, and the same man came to Hislop's house, where the deponent and his brother was, and being asked if it was any of the pannels? pointed to George Robertson, and deponed, That he thought he was the same man; and deponed, When he saw George Robertson, or the pannel that he pointed out before on the stair, he also saw a woman on the stair-head, who came out and went in again; but whether she was pushed in or not he knew not. Depones, He saw [illegible] breaking up the Collector's door, but

who it was he knew not; but after the first stroke he heard given on the door, that man that came to Hislop's house with his brother and him came down the stair. Deponed, That the same man in Hislop's house told his brother that he had left his horse in Crail; and deponed, That the said man told his brother that he was going to Bailie Johnston's in Easter Anstruther. Deponed, The said man also said he had been in Alexander Pollock's drinking with John Laing in the Dean. Deponed, he also said, That as he came up the street, and heard the noise in Mrs Fowler's house, he went up the stairs, but a woman beat him thrice, and so he came down. Deponed, That he did not hear that man in Hislop's house dissuade the deponent or his brother to go to Mrs Fowler's house; for that they were unwilling of themselves to go, believing that there had a quarrel happened between the Collector and the house. Deponed, That when that man went out of the house, he saw him go on the road to Anstruther. *Causa scientiæ patet.* And this was the truth, as he should answer to God. And declared he could not write.

(Signed) WA. PRINGLE.

HELEN WALLACE, servant to John Hislop in Pittenweem, aged eighteen years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That about the time libelled, being that night in which Collector Stark was robbed at Pittenweem, the deponent being upon the street about eleven

o'clock at night, met with Mr Robertson, pannel, whom she then pointed out, who told that as he came from drinking a bottle of wine in Mrs Pollock's house, he heard a noise up in Mrs Fowler's, upon which he went up to her house, but was immediately forced down again, being beat thrice upon the breast by a woman: That at the deponent's desire, the said Mr Robertson, with the two preceding witnesses, went in to Mr Hislop, the deponent's master's house: That when the deponent spoke of Lewis Hillock's going out to see what was the matter, he the said Lewis said, For his part he would sit still, for what he did not see he would not have in his power to tell: Whereupon Mr Robertson gave him a clap upon the shoulder, and said he was wiser than any of them. *Causa scientiæ patet.* And this was the truth, as she should answer to God. And declared she could not write.

(Signed) GILB. ELLIOT.

ALEXANDER POLLOCK, brewer in Pittenweem, aged years or thereby, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That he was at home in his own house in Pittenweem all that night in which Collector Stark was robbed: That George Robertson, pannel, whom the deponent knew very well was not in his house that night, neither did he drink with him at any time that night, or all that day. *Causa scientiæ patet.* And this was the truth, as he should answer to God.

(Signed) ALEX. POLLOCK.
GILB. ELLIOT.

CHARLES SLIGH, serjeant in the regiment of Welch Fuzileers, aged thirty-eight years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That being called upon by Alexander Clerk, Supervisor of Excise, (who formerly deponed,) at the time libelled, and the said Alexander Clerk having demanded assistance from him, in regard that Collector Stark was robbed at Pittenweem, and, he believed, murdered, the deponent caused raise three soldiers, two of whom he carried along with himself, and the said Mr Clerk and the other he sent to raise the rest of the party that then lay at Anstruther Easter. Deponed, That in going to Pittenweem, in the town of Anstruther, they met with three people coming up to them, and having challenged them what they were, they answered, They were going about their lawful affairs, and had almost passed by, when the said Mr Clerk desired that the serjeant might apprehend them; whereupon the deponent making a step, with his halbert catched hold of Hall, the pannel, and having delivered him to the soldiers, they carried the said Hall to Pittenweem, where being seen by the servant-maid of Mrs Fowler's, where Mr Stark that night lodged, she, the said servant-maid, told that that man was amongst those that had been in her mistress's house that night and had broke her head; and the two soldiers who had him in custody, the one of them producing a suit of linen, and the other producing a bible, which they said the said Hall, the pannel, had dropt by the way; and

the Collector's clerk seeing them, told that the bible and bag with linen both belonged to his master. Deponed, That thereafter Hall, the pannel, told who were his accomplices, and particularly Andrew Wilson, a poor hirer like himself, and another whose name the deponent did not remember: That the said persons were lodged and had their horses stabled in one Wilson's in Anstruther Easter. Deponed, That by this time there were five more soldiers come up, four of whom were left at Pittenweem with Hall, and the rest returned to Anstruther Easter with the deponent and Mr Clerk, in search of Wilson and the others condescended upon by Hall the pannel; and having found, in James Wilson's house, the said Wilson and Robertson, pannels, were apprehended and committed to prison. Deponed, That thereafter the deponent went in company with Bailie Brown and one Galloway, a former witness, in search of the goods that had been robbed from Collector Stark, and they found a pistol, said to belong to Collector Stark, and a stocking and a shirt which belonged to the Collector's clerk. *Causa scientiae patet.* And this was the truth, as he should answer to God.

(Signed) CHR. SLIGH.
ALEX. FRASER.

JOHN [illegible], sometime soldier in the regiment of Welsh Fuzileers, aged thirty-two years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That in coming along with the imme-

diate preceding witness, he saw Hall the pannel drop a book and a bundle of linen, and the deponent took up the book; and having produced the same in Pittenweem, the Collector's clerk told that that book was his master's bible; which bible being then exhibited, the deponent deponed, That it was the very bible which he exhibited at Pittenweem, and was acknowledged by the Collector's clerk to be his master's. *Causa scientiae patet.* And this was the truth as he should answer to God. And declared he could not write.

(Signed) ALEX. FRASER.

JOHN GREGORY, soldier in the regiment of Welsh Fuzileers, aged thirty years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That time libelled, he was employed by Alexander Clerk, Supervisor of Excise, with the serjeant and another soldier, to conduct William Hall, pannel, from Anstruther Easter to Pittenweem; and that while they were bringing him along, he saw the said Hall throw away a pistol and drop a bag with linen, which the deponent took up and brought along with him to the house of Mrs Fowler in Pittenweem, where, having produced the said bag of linen, the deponent heard Collector Stark's servant aver, that the said bag and linen therein contained belonged to his master; and the deponent heard the said Hall acknowledge that he had thrown away the said pistol about the time he was seized; and the deponent afterwards went to the place where

Hall was seized and found the pistol, and believed that it was one of the pistols exhibited in Court. *Causa scientiae patet.* And this was truth, as he should answer to God. And declared he could not write. (Signed) ANDW. FLETCHER.

JAMES WILSON, maltman and brewer in Anstruther Easter, aged fifty years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That upon the ninth of January last, John Galloway, the witness already examined, and William Hall, pannel, came to the deponent's house at Easter Anstruther about five or six o'clock at night, and brought with him four horses, two of which, they informed the deponent, belonged to Andrew Wilson and George Robertson, pannels: That said Galloway and Hall got their suppers in the deponent's house, and went from thence betwixt eight and nine at night: That betwixt twelve and one at night, Andrew Wilson, pannel, and John Galloway came to the deponent's house, and about half an hour thereafter came George Robertson, pannel: That some little time thereafter the deponent having occasion to go to Bailie Johnston's house for some brandy, as he was returning home, he met with Alexander Clerk, Supervisor of Excise, and a party of soldiers with him who had surrounded the deponent's house, at least had surrounded the door of the house; and the said Alexander Clerk asked the deponent, How he came to quarter soldiers? and particularly inquired for Andrew Wilson and George Robertson, pannels, and the

fore-mentioned John Galloway; to which the deponent answered, that he quartered none but honest men to his knowledge; upon which the said Alexander Clerk said, that the above persons had robbed Collector Stark, and for ought that he knew had murdered him, for he neither could be found dead nor alive: Thereafter the deponent going into his house, went into the room where the above persons were quartered, to set by the brandy, at which time the said Andrew Wilson and George Robertson, pannels, were in bed; and Andrew Wilson did then deliver to the deponent a handful of silver uncounted, which the said Andrew took out of his breeches' pocket, being then lying in bed with his breeches on, and delivered it to the deponent, desiring him to put it his pocket; which money the deponent did afterwards deliver to Bailie Brown, and upon counting it it appeared to be two-and-thirty shillings: That before the deponent went for the brandy as aforesaid, and while Andrew Wilson was sitting at the fireside, he delivered to the deponent something which the said Andrew called a seal, as also a pair of buckles, but the deponent did neither look at the seal nor the buckles: That Wilson desired the deponent to keep them till he returned, which he afterwards delivered to Bailie Brown. *Causa scientiae patet.* And this was truth, as he should answer to God.

(Signed) JAMES WILSON.
ANDW. FLETCHER.

ELSPETH BROWN, spouse to James Wilson, the

immediate preceding witness, aged forty years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, conform to the immediate preceding witness, as to the time and manner the pannels and John Galloway came to her house both in the evening and the midnight; and further deponed, That when Andrew Wilson and John Galloway were sitting together, about one of the clock in the morning, near the deponent's bed-side, she observed John Galloway weeping and to be in great concern, and heard him say, that if that man did not come up, what will come of us? And then heard Wilson the pannel say, If he do not come up we will suffer for it: That George Robertson, pannel, was not then come, but came in a little thereafter by the brew-house door: That the pocket-book exhibited in Court was found on the Saturday's night upon the deponent's bed-head, and at the same time a parcel of bank-notes was found upon the bed-head where Wilson and Robertson, pannels, had lain; which pocket-book and bank-notes were delivered to Bailie Brown. *Causa scientiae patet.* And this was truth, as she should answer to God. And declared she could not write.

(Signed) AND. FLETCHER.
WA. PRINGLE.

JANET ADAMSON, servant to James Wilson, a former witness, aged eighteen years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed,

conform to the two preceding witnesses, as to the time the pannels came to James Wilson, her master's house, both in the evening and midnight; and that she saw John Galloway weeping after his coming in about midnight, and heard Wilson the pannel say, If Hall, another pannel, did not come up, they would suffer for it. And deponed, That Robertson, pannel, came in at the brew-house door, and soon thereafter, he, Wilson and Galloway, went into the room where they lay; and upon the noise of the house's being surrounded, Robertson and Wilson, pannels, jumped into their beds, and thereafter the deponent saw her master go into that room, and deponed, conform to the immediate preceding witness, as to the pocket-book and bank-notes being found and delivered to Bailie Brown. *Causa scientiae patet.* And this was the truth, as she should answer to God. And declared she could not write. (Signed) ANDW. FLETCHER.

ROBERT BROWN, Bailie in Anstruther Easter, aged thirty-seven years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, depones, That about three of the clock in the morning of the 10th of January last, after Collector Stark was robbed, the deponent was sent for to James Wilson's house, where there were some persons in the custody of some soldiers, who were delivered over to the deponent, in order to be imprisoned, being accused by Alexander Clerk, Supervisor of Excise, of having accession to the said robbery: And these persons were Andrew

Wilson and George Robertson, pannels; there was also a third, who was not in the pannel; and there was found upon Andrew Wilson, pannel, four pound two shillings Sterling; upon George Robertson pannel, twenty shillings Sterling, and the deponent received also from James Wilson, the landlord, thirty-two shillings, which he said Andrew Wilson the pannel had given him; also from the landlord, a seal and two silver-buckles, which the deponent believed was the same that were then exhibited in Court, which he told he likewise got from Andrew Wilson pannel; and the deponent got a penknife from the landlady, she told she had got from her husband, and who by mistake had neglected to give it to the Bailie, which was the same then produced in court. Deponed, That towards the evening of that day, the pocket-book exhibited in Court was found upon a bed-head and delivered to the deponent; and at the same time, in another room where the pannels lay, was found upon the bed-head some bank-notes, to the value of forty-one or forty-two pound, which agreed exactly with a note taken out of the said pocket-book by the Collector. Depones, That the same morning before day light, the deponent went out to the fields with Galloway, a former deponent, and found a shirt belonging to the Collector, as also stockings belonging to him. *Causa scientiæ patet.* And this was truth, as he should answer to God.

(Signed) Ro. Brown.
Wa. Pringle.

PHILIP MILLER, Bailie in Anstruther, aged forty-five years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed conform *præcedenti*, as to the persons incarcerated, and as to the particulars found upon them and delivered by James Wilson, except as to the penknife, buckles, seal, and the two and thirty shilling said to be delivered to the landlord, nor was the deponent present when the pocket-book and bank-notes were found. *Causa scientiæ patet.* And this was truth, as he should answer to God.

(Signed) PHILIP MILLER.
WA. PRINGLE.

ANDREW FOWLER, present Bailie in Pittenweem, aged thirty-six years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, depones, That upon Monday after Collector Stark was robbed, the deponent was called by Alexander Clerk, Supervisor, to search for a purse of gold that had been dropped in the fields, which was said to belong to the said Collector; and accordingly they did search, and found it near to a dunghill betwixt Pittenweem and Anstruther; and the deponent believed that the purse then exhibited in Court was the purse that was there found, and containing the gold; and there was told out of the purse to the deponent, fifty-one guineas and three half guineas, and the deponent delivered the purse and gold to

the Supervisor. *Causa scientiæ patet.* And this was truth, as he should answer to God.

(Signed) AND. FOULLER.
WA. PRINGLE.

The Lord Justice-Clerk, and Lords Commissioners of Justiciary, ordained the Assize instantly to inclose in this place, and return their verdict, in the Old Court-House to-morrow, half an hour after twelve, and ordained the haill fifteen to be then present, each person under the pain of law, and the pannels to be carried back to prison.

CURIA JUSTICIARIA S. N. D. Regis, tenta in prætorio burgi de Edinburgo, undecimo die mensis Martii 1736, per honorabiles viros, ANDREAM FLETCHER de Miltown, Justiciarum Clericum, Dominum JACOBUM MACKENZIE de Roystoun, Magistrum DAVIDEM ERSKINE de Dun, Dominos GUALTERUM PRINGLE de Newhall, et GILBERTUM ELLIOT de Minto, et Magistrum ALEXANDRUM FRASER de Strichen, Commissionarios Justiciariae dict. S. D. N. Regis.

Curia legitime affirmata,

Intran. ANDREW WILSON,
WILLIAM HALL, and } *Pannels.*
GEORGE ROBERTSON,

INDICTED and ACCUSED, as in the former sederunts.

The said day the persons who passed upon the

assize of the said pannels, returned their verdict in presence of the said judges, whereof the tenor follows.—*Edinburgh*, 11*th March* 1736. The above Assize having inclosed and chosen James Rob, merchant in Edinburgh, to be their Chancellor, and William Gellatly, merchant there, to be their Clerk, and having considered the indictment pursued at the instance of Duncan Forbes of Culloden, Esq. His Majesty's Advocate for his Highness' interest, against Andrew Wilson, late in Pathhead, William Hall, indweller in Edinburgh, and George Robertson, stabler in Bristo, pannels; with the Lord Justice-Clerk and Lords Commissioners of Justiciary their interlocutor thereupon, and depositions of the witnesses adduced for proving thereof; they all in one voice did find Andrew Wilson and William Hall, pannels, guilty, and George Robertson art and part in the crimes libelled. In witness whereof, thir presents were subscribed by their said Chancellor and Clerk in their names, day, month, place and year of God respective before written.

(Signed) JAMES ROB, *Chancellor.*
WM. GELLATLY, *Clerk.*

The Lord Justice-Clerk and Lords Commissioners of Justiciary having considered the verdict of assize returned against Andrew Wilson, William Hall, and George Robertson, pannels, of date the eleventh instant, they, in respect thereof, by the mouth of John Dalgleish, Dempster of Court, decerned and adjudged the said Andrew Wilson,

William Hall and George Robertson, to be taken from the Tolbooth of Edinburgh, upon Wednesday the fourteenth day of April next to come, to the Grassmarket of Edinburgh, the common place of execution of the said burgh, betwixt the hours of two and four of the clock of the afternoon of the said day, and there to be hanged by the neck upon a gibbet, by the hands of the executioner, until they be dead; and ordained all their moveable goods and gear to be escheat and inbrought to his Majesty's use: Which was pronounced for doom.

(Signed) AND. FLETCHER.
JA. MACKENZIE.
DA. ERSKINE.
WA. PRINGLE.
GILB. ELLIOT.
ALEX. FRASER.

AUTHENTIC EXTRACT

OF THE

PROCEEDINGS

IN THE TRIAL OF

CAPTAIN JOHN PORTEOUS.

Die Veneris, 25 *Martii*, 1737.

Ordered, by the Lords Spiritual and Temporal, in Parliament assembled, That the Authentic Extract of the Proceedings in the Trial of Captain JOHN PORTEOUS, laid before this House the 3d day of this instant March, be printed.

WM. COWPER, *Cler' Paliamentor'*.

CURIA JUSTICIARIÆ, S. D. N. Regis, tenta in Novo Sessionis Domo Burgi de Edinburgo, quinto die mensis Julii, Millesimo septingentesimo trigesimo sexto, per Honorabiles Viros, ANDREAM FLETCHER de Milton, Justiciarium Clericum, Dominum JACOBUM MACKENZIE de Roystoun, Magistrum DAVIDEM ERSKINE de Dun, Dominos GUALTERUM PRINGLE de Newhall, et GIL-

BERTUM ELLIOT de Minto, Commissionarios Justiciarii, dictos S. D. N. Regis.

Curia legitimé affirmata.

Intran.

JOHN PORTEOUS, lately one of the Captain-lieutenants of the city guard of Edinburgh, present prisoner in the tolbooth of Edinburgh, pannel. INDICTED and ACCUSED at the instance of Duncan Forbes, Esquire, his Majesty's Advocate for his Highness's interest, for the crimes of murder and slaughter, and others, as is more fully mentioned in the indictment raised against him there annext. Setting forth, THAT WHERE, by the law of God, the common law, the municipal law and practice of this kingdom, and the laws of all other well-governed realms, murder and slaughter, maiming and wounding with mortal weapons, any of the subjects of such realms, and the ordering, commanding, and causing any band, or number of men, armed with firelocks, and other mortal weapons, to fall upon, wound, murder, and destroy numbers of his Majesty's subjects, innocently and lawfully assembled, by firing sharp shot amongst them, whereby multitudes are, or may be endangered, and many men, women, and innocent children are, or may be killed or wounded, without any just cause or occasion, and without lawful warrant, more especially when committed in the public streets of a city, by a person lawfully commissioned by the Magistrates thereof, to command

such band of armed men, for the preservation of peace and order, and for the defence of the inhabitants, and others resorting thereto, are crimes of a high nature, and severely punishable: YET TRUE IT IS and of verity, That he, the said John Porteous, had presumed to commit, and was guilty and accessory, or art and part of all and every, or one or other of the foresaid crimes, aggravated as aforesaid: IN SO FAR AS, upon the fourteenth day of April last, or one or other of the days of the said month, when the deceased Andrew Wilson, sentenced to be hanged to death by the High Court of Justiciary, was to be executed at the Grassmarket of the city of Edinburgh, he being at that time one of the captain-lieutenants of the town guard of the said city, lawfully commissioned by the Magistrates and town council thereof; and in the ordinary course of rotation with the other officers of the said guard, being ordered to attend at the said execution, to preserve the peace and support the executioner in the discharge of his duty, having under his command a detachment of about seventy men, he did then attend in the said Grassmarket accordingly, and after the said Andrew Wilson had hung upon the gallows, erected for his execution, until he was dead, at least for a considerable time, and so long as there was ground to conclude he was dead; he, the said John Porteous, shaking off all fear of God, and respect to his Majesty's laws, and conceiving a most wicked and malicious purpose of destroying, wounding, and

maiming numbers of his Majesty's subjects, the inhabitants of the said city of Edinburgh, and others there assembled at the said execution, without any just cause or necessary occasion, ordered the said detachment of the guard under his command to fire upon the people so assembled at the said execution; and the men, at least severals of them, having fired, as it seems he apprehended, over the heads of the multitude, so as to avoid doing them harm, he with threats and imprecations repeated his commands to fire, calling out to them to level their pieces, and be damned, or words to that purpose; and at or about the same time, he levelled the firelock that was in his own hand, taking aim at Charles Husband, servant to Paul Husband, confectioner in the Abbey of Holyroodhouse, and most wickedly and murderously fired at him, whereupon he immediately dropped to the ground, having received a wound by a bullet, or large drop of lead, on the left side of his head, which pierced into his brain, and another large wound likewise by a bullet, or large drop of lead, on the left side of his neck, and a third wound in his body, and a fourth wound in his left hand, at least a mortal wound or wounds, whereof he died in some short space thereafter; AT LEAST he did so level his piece, and appeared to take his aim at some one of the innocent multitude, who happened to stand directly over against him, and he did fire, and upon his so firing, the said Charles Husband, at least one or other of the persons particularly after mentioned,

or more of them, did immediately drop to the ground, having received a mortal wound or wounds, whereof they soon after died; and by his said example and command, severals of the said guard, to the number of twenty, less or more, did at the same time with him, or soon after him, fire upon the innocent multitude, whereby all, or one or more of the following persons received mortal wounds, whereof they soon after died, viz. Archibald Ballantyne, son to John Ballantyne younger, dyster in Dalkeith, received several wounds, with bullets, or large drops of lead, which pierced into his body, at least a mortal wound or wounds in his head or body, whereof he died a few days thereafter; and John Anderson, son to George Anderson in Craighead, drover, received a wound in the head with a bullet, or large drop of lead, at least a mortal wound or wounds in his head or body, so that he died in a few hours thereafter; and the following persons were grievously maimed, hurt, and wounded, to the great danger of their lives, viz. Margaret Arthur alias Airth, residenter in the Canongate, near the Watergate thereof, Jean Peal, servant to James Macdowal, merchant in Edinburgh, David Wallace, journeyman wright in Edinburgh, James Philip, late servant to Lauder, Esq. residenter in the Canongate, David Kidd, tailor in Edinburgh, Patrick Spalding, apprentice to David Mitchel, jeweller in Edinburgh, James Lyle and Alexander Wallace, both servants to James Wright, staymaker in Edinburgh, John Miller, tailor in Edin-

burgh, David Ogilvie, writer in Edinburgh, and James Nivan, late servant to William Sellars, writer in Edinburgh, residenter in the Potterrow: AT LEAST the said persons were so killed, wounded, and maimed, by the firing in manner, and by the direction, as aforesaid, and by the second firing after mentioned; for, not contented with the barbarities thus committed, after he had with the said company or detachment of the city-guard marched towards, or into the place or street called the West Bow, he, without just cause or occasion, again ordered the men under his command to face about and fire upon the people, and at or about the same time, he fired a musket or firelock that was in his own hand, having either reloaded, or caused to be reloaded his own piece, or taken another out of the hand of one of the guard; and severals of the said guard did, upon that second example and command of his, fire upon the multitude, whereby Alexander Macneil, son to Edward Macneil, indweller in Mortonhall, received a shot in the head with a bullet, or lead drop, which pierced into his brain, at least a mortal wound or wounds in his head or body, so that he died thereof in a few days thereafter; and Margaret Cowan, servant to William Ogilvie, tailor in St Mary Wynd, in Edinburgh, received a wound in the head above the left eye, with a bullet, or large drop of lead, which pierced into her brain, at least a mortal wound or wounds in her head or body, so that she died thereof in a short space there-

after; and Henry Grahame, tailor in Canongate, received a wound in the head, with a bullet, or large drop of lead, which pierced into his brain, at least a mortal wound or wounds in his head or body, of which he died in a few hours thereafter: AT LEAST, by this and the other firings by him, and by his order and example above mentioned, all, or one or more of the persons particularly above recited as having been killed, received mortal wounds of which they soon after died, and all, or one or more of the persons above recited to have been wounded, were grievously maimed, hurt, and wounded, to the great danger of their lives: AT LEAST, at the time and place aforesaid, the said persons above named and mentioned to have been respectively killed and wounded, were all, or one or more of them, wickedly and maliciously slaughtered, murdered, and wounded, by wounds severally given them by mortal weapons; AND HE WAS GUILTY art and part of the slaughter, murder, and wounding of all, or one or more of them; all which, or any part thereof, being found proven by the verdict of an assize, in presence of the Lords Justice-General, Justice-Clerk, and Commissioners of Justiciary, he ought to be most exemplarly punished with the pains of law, to the terror of others to commit the like in time coming. *Sic Subscribitur*,

CH. ARESKINE. *A. D.*

Pursuers.

Duncan Forbes, Esq. his Majesty's Advocate.
Mr Charles Erskine, his Majesty's Solicitor.
Mr Hugh Forbes, his Majesty's Advocate-depute.
Mr Patrick Haldan.
Mr Hugh Murray, Kinnynmont.
Sir James Elphingstoun.

Prolocutors in Defence.

Mr James Grahame, Jun.
Mr Henry Home.
Mr Alexander Lockhart.
Mr James Lessly.
Mr James Holburn. Advocates.

The libel being openly read, and debate *viva voce*, in presence of the judges, pannel, and jury, the Lords ordained both parties to give in their informations to the Clerk of Court, in order to be recorded, and the pursuers to give in theirs against Friday next, at six o'clock at night, and the prolocutors for the pannel to give in theirs against Tuesday thereafter, and continued the cause till Friday the 16th inst. and ordained assizers and witnesses then to attend, and the pannel to be carried back to prison.

July 12*th*, 1736.

INFORMATION

FOR

His MAJESTY'S ADVOCATE, for his Highness's Interest,

AGAINST

JOHN PORTEOUS, late Captain-Lieutenant of the City-Guard of Edinburgh,—*Pannel.*

THE pannel is charged by the indictment with murdering, slaughtering, maiming, and wounding divers of his Majesty's subjects, by firing with his own hand, and causing and ordering a band of armed men, under his command, to fire upon a multitude of innocent people, assembled to see an execution in the Grassmarket of the city of Edinburgh, without any just cause or provocation; contrary not only to the laws of God and nature, and to the good [illegible] and all other well-governed realms, but also contrary to the express duty of his office, who was one of the commanders of the City Guard, intended to preserve the peace of the city, and to protect the inhabitants thereof from all violence; and who was on that occasion entrusted with the command of a large detachment

of the said guard, to preserve peace and order, to secure the execution of a sentence of the High Court of Justiciary, and to prevent all riots and tumults, whereby the execution of the said sentence might be disappointed, the laws might be violated, and the people assembled might be hurt or destroyed.

The indictment sets forth, particularly, That, at the time and place libelled, where a great multitude of innocent persons, of all ages, and of different sexes, were lawfully assembled, to see the execution of Andrew Wilson, sentenced to be hanged by the High Court aforesaid; the pannel, having under his command a detachment of seventy armed men of the City Guard, and having conceived a most wicked and malicious purpose of destroying, maiming, and wounding, numbers of his Majesty's subjects, the inhabitants of the said city, and others assembled at the said execution, without any just cause or necessary occasion, ordered the said detachment under his command to fire upon the people so assembled; that the men under his command, having probably, in his apprehension, fired over the heads of the people, he, with threats and imprecations, repeated his commands to fire, calling out to them to level their pieces, and be damn'd; that, at or about the same time, he levelled the firelock that was in his own hand, taking aim at one Charles Husband, and fired at him, whereupon he immediately dropt to the ground, having received wounds whereof he

instantly died; at least, that he levelled his piece, seeming to take aim at some one in the crowd, and fired it; and that, upon his firing, the said Charles Husband, or one or other of the persons in the indictment mentioned dropt, having received wounds by bullets, of which they instantly died; and that by his commands and example, several of the City Guard under his command fired upon the innocent multitude, whereby the persons particularly mentioned in the indictment were killed, maimed, and wounded.

The indictment further charges, That, not contented with this barbarity, the pannel, after he had marched off his detachment towards, or unto the place or street called the West Bow, again ordered the men under his command to face about and fire upon the people, and at or about the same time, fired a musket or firelock that was in his own hand, having either reloaded, or caused to be reloaded, the piece formerly fired by him, or having taken another out of the hand of one of the guard; and that several of the said guard did, upon that second example and command, fire upon the multitude, whereby the persons described in the indictment were killed or mortally wounded: And the indictment concludes, in common form, that the pannel is guilty, or actor art and part, of the crimes aforesaid, or one or other of them.

The charge in this indictment is so heinous, that one should have imagined it would have been decent in the pannel to have made no objection

to the relevancy, and to have founded upon no defence for avoiding the effect of the libel, if true, but to have contented himself with a flat denial thereof, reposing himself upon his innocence, if he is truly not guilty of the facts alleged, without any other desire but that of having a fair examination of unbiassed witnesses, to be produced by him as well as the prosecutor, in order to discover the real circumstances of the transaction.

But his procurators, it seems, thought it their duty to move every objection against the relevancy of the libel, and to offer every defence that their invention could suggest, from a particular relation of the circumstances of the whole transaction, which they laid before the Court upon the pannel's information, and which they offered to prove, to make good their defence.

They informed the Court, therefore, on behalf of the pannel, That the Magistrates, apprehending that some violent attempt might be made for rescuing Wilson, the offender sentenced to be hanged, had ordered the pannel to attend the execution, with the greatest part of the City Guard, to support and protect the executioner in the discharge of his office, with [illegible] by force; that, to make those directions effectual, powder and ball were, by the town treasurer, delivered out of the town's magazine to the City Guard, the morning of the execution, with directions to load their pieces. That, besides this precaution, the danger of the rescue appeared in the

Magistrates so great, that they desired of General Moyle, and obtained, a detachment of the regular troops, who were posted near to the place of execution, in order to support the City Guard, if there had been occasion; and whose commanders were told, that the Lord Provost would give them authority to fire, if it should prove necessary; that the pannel, with the Town Guard, attended accordingly the execution; that when the offender was hung up on the gibbet, the magistrates retired from the scaffold, and repaired to a house over against it, in the Grassmarket; that after the offender had been hung up for some time, the multitude became unruly, and begun to fling stones of great size, and with great violence; that some of the guard were thereby hurt; one had his shoulder blade broke, others were bruised, and the timber of the drum was beat to pieces; that the insolence of the mob growing still greater, and they pressing from all sides upon the guard, the pannel, who apprehended they might have intended to carry off the criminal, who by this time was cut down, in order to attempt the recovering him to life, found it necessary for him to keep off the multitude by threats and menaces; that to this end he presented his piece first to one quarter and then to another, calling to the people to stand off, and threatening that, if they did not, he would fire; that nevertheless, he neither fired himself, nor gave any orders to fire; but, on the contrary, when some of the guard, provoked by the hurts

they received had, without his orders or authority, presumed to fire, whose example was followed by several others, he did all he could to prevent that mischief, by commanding them to desist, and actually did beat down the muzzle of one of the men's pieces, who was presenting it in order to fire; that finding he could not be obeyed, he endeavoured to march off his men, and prevailed with several of them to follow him some small way up the West Bow, when again some of those men who followed him, provoked by what he did not know, faced about, and fired towards the Grass-market; that the first notice he had of this firing was by hearing it, which made him turn about in order to stop it; that at this last place, he neither fired nor gave orders to fire; that he marched as many of his men as he could gather together back to the City Guard Room; that there he prevented the men's cleaning their pieces, that the guilty who fired might be distinguished from the innocent who did not fire; that his own piece had not at that time been at all fired; that, conscious of his innocence, and that he had, on this, as well as on every former occasion, done his [illegible] patience and temper, he present [illegible] was easier for the magistrates, whereas nothing, and that in him than to have made his escape, had in his their presence the firelock which [illegible] to have hand was presented, and appeared [illegible] impos- been at all fired; and that therefore it [illegible] sible the libel, as [illegible] could be true [illegible]

From this, which was said to be the state of the case, the procurators for the pannel contended, First, That the libel was insufficient, as not describing with proper accuracy the particular part of the street, where the person supposed to be shot by the pannel stood, and his situation with respect to the pannel at the time, because thereby the pannel was deprived of the opportunity of making his defence, by founding it particularly on circumstances which he might avail himself of, if the position and situation had been distinctly described.

To this it was, and is answered, That the libel is as particular as the law requires, describing the street where the execution was had, which is all that the utmost scrupulosity could expect in such a case. Minute circumstances cannot be known to the prosecutor, or certainly discovered, but by proof upon the trial; every circumstance of the pannel's own acting must be known to him; and, therefore, if, from the position or situation in which he was at the time of the firing, he can show that it was impossible he could have killed the person whom he is charged to have shot, describing and proving those circumstances, he may have advantage from them; but cannot object to the prosecutor, that he did not minutely describe a situation that was not known to him, and which describing perhaps erroneously, might minister an unjust occasion to a criminal to escape justice; wherefore this objection to the form of the indictment ought to be repelled.

But, in the second place, the procurators for the pannel, very unnecessarily, one should think, if he is innocent of firing, or ordering to fire, and in some degree inconsistently with that plea, alleged, that the delivering out powder and ball to the city guard,—the ordering so great a detachment to attend,—the calling for the regular troops to support the town-guard,—the intimation to the commander of those troops, that they should have orders to fire in case of necessity,—and the direction to the pannel to support the execution of the sentence against Wilson, and in case of a violent rescue or deforcement to repel force by force, amounted to a flat order from the magistrates to fire when it became necessary; and that the violent assault made by the mob, as aforesaid, with stones, which were to be considered as lethal weapons, in order, as the pannel believed, to carry off the offender, in hopes of recovering him to life, made it necessary to repel force by force. Wherefore these circumstances to infer the order, and the violent assault of the mob as mentioned, ought to be sustained and admitted to proof as a total defence against the indictment, at least as circumstances fit to mitigate the punishment, and remain it from the *poena ordinaria*; since the pannel being *versans in licito*, and engaged in the discharge of a lawful piece of duty, if any excess was committed by him, it ought not to be attended with capital punishment, but ought to be corrected *extra ordinem*, according to the degree of the excess.

To this it was answered, That though it were true, which is not at all upon the part of the prosecutor denied, that the magistrates, upon just apprehension of disorders, and an attempt for a violent rescue of the criminal, who was sentenced to die, had ordered powder and ball to be distributed to the guard, had increased their numbers, had obtained assistance from the commander of the regular troops, with assurance that in case of necessity they should be authorized to fire, had directed the pannel at all hazards to support the execution, and prevent a violent rescue, and had even told him, that, in case of necessity, he was to repel force by force, it will not in the least follow that those orders could in any degree justify him, except in case of necessity, except there had been an attempt towards a violent rescue, which could not otherwise have been prevented, and except all the proper precautions for dissipating otherwise the mob, and for legitimating the act of firing upon them, had been previously made use of.

For, in the first place, no order from any civil magistrate whatever can justify a barbarity so horrid as that which is charged on the pannel. Had the provost and all the magistrates of Edinburgh been present on the spot, and had they ordered him to fire upon the innocent people when there was no just cause for so doing, those orders indeed might subject the magistrates, as well to the penal consequences that attend murder, but could not in the least acquit him, who was not at all bound

to obey such illegal orders, and who thereafter acted at his peril.

In the second place, It is not at all pretended that the pannel had any orders expressed or implied to fire, except the violence of an attempt to rescue, not otherwise avoidable, made it necessary. Had that been truly the case, firing possibly might have been the pannel's duty, the reading the proclamation undoubtedly would have made it justifiable; and this the magistrates knew when they ordered ammunition to be distributed, and invited the regular troops to their assistance. But till it became necessary, when there was no hazard of a rescue, before any disorder was sought to be quelled by the legal precaution of reading the proclamation, which is intended to intimidate rioters, and to separate the innocent from the guilty, by giving due notice to all thoughtless people, who, without any malevolence, are mixed with the multitude, to separate from the ill meaning, it was the most cruel, as well as most unjustifiable act, that has at any time been heard of, to make use of the weapons that were put in the hands of the guard for the security of the peace and of the people, to destroy so many innocents who had not in any degree offended.

For, thirdly, Though the pannel mentioned the flinging of stones, and the size of some of them, with some hurts received therefrom, yet the libel charges, and he admits, that the criminal was cut down before this trifling provocation prevailed with

any one to fire. His duty then, so far as concerned the execution of the sentence, was over. He alleges no danger, nor can he in those circumstances of a rescue, no invasion with fire arms or other mortal weapons, fit to deforce or destroy a detachment of seventy disciplined men with loaded pieces and screwed bayonets. How then can the exigence or the orders defend him? If his act had been absolutely necessary, some defence might have been founded on that necessity, joined with his orders; but when his allegations, though they were true, do not point out the least necessity, and are in reality founded on nothing else than the customary impertinence, on such occasions, of flinging dirt and stones at the executioner, though the provocation thereby given might perhaps justify a choleric man for drubbing any of the actors for their wantonness, yet to be sure it could not justify the slaughtering of the offender, far less can such impertinence in a few boys, or other idle people, excuse the firing sharp shot upon an innocent multitude, whereby numbers of his Majesty's subjects were destroyed. And therefore it seems to be beyond all doubt, the pannel can find no shelter from those orders, or the duty he imagines lay upon him [illegible]se, and must therefore stand or fall, upon his being or not being guilty of the facts charged upon him.

The procurators for the pannel endeavoured to find an argument for him in a late resolution of the Court, which suspended a sentence of the

Court of Admiralty, proceeding upon an interloquitor that found it necessary for soldiers, who happened to kill in the execution of their duty, when by order attending customhouse officers, to prove, that the killing was necessary for the defence of their lives, inferring from this resolution that the Court did not think it necessary for the pannel to prove that he was in danger of his life. And though all that their observation necessarily implies were granted, they could have no benefit by it, because, in this case the pannel neither does, nor can aver, that the firing which he was personally guilty of, and ordered, was necessary for securing the execution of that trust that was committed to him, or for preserving the rights of the Crown, or any subject.

Where a man has by law weapons put in his hand, to be employed, not only in defence of his life when attacked, but in support of the execution of the laws, and in defence of the property of the Crown or liberty of any subject, he doubtless may use those weapons, not only when his own life is put so far in danger that he cannot probably escape without making use of them, but also when there is imminent danger, that he may by violence be disabled to execute his trust without resorting to the use of those weapons; but when the life of the officer is exposed to no danger, when his duty does not necessarily call upon him for the execution of his trust, or for the preservation of the property of the Crown, or the preservation of the pro-

perty or liberty of the subject, to make use of mortal weapons which may destroy his Majesty's subjects, especially numbers of them who may be innocent, it is impossible, from the resolution of the Court of Justiciary hinted at, to expect any countenance to, or shelter for the inhumane act.

And upon a principle very nearly allied to this, the pannel's pretence, that, being *versans in licito*, and entrusted with the execution of legal orders, any excess that for lack of discretion he may have been guilty of, cannot be punished *pœna ordinaria*, ought to be repelled; for it is obvious, the trust reposed in him, and the duty expected from him, was no more than to see the execution perfected, and to resist any violent attempt to rescue which should disappoint the execution of the law. Now, when the sentence of the Court of Justiciary was executed, when the criminal was hanged and cut down, before any person fired, the trust reposed in the pannel, and the duty expected from him, ceased; he was no longer an officer employed, to that end for which the fire-arms were loaded, and his actions came to be estimated of by the same rules, that would have made them lawful or unlawful upon every ordinary occasion, where no particular danger threatened, and where no necessary service was in view.

And, therefore, as in such cases, the pannel must be convinced, that nothing short of being constituted in immediate danger of death without firing could justify him or his guard for making use of

loaded fire arms, he must in consequence acknowledge, that, in the case in question, no danger of life, which he could not have avoided, having threatened him and his guard, he was absolutely inexcusable for firing, and that, therefore, his mischievous and temerarious act must be attended with the highest penalty.

An armed man who assaults, and without just cause destroys another man though armed, and in no particular trust or confidence with him, the law considers and demeans as a murderer; but when the captain of a city guard, who has an armed force committed to his care for the good and safety of the community, thinks fit, upon any slight offence or provocation, to turn those arms and that force upon a crowd of citizens lawfully as well as innocently assembled, he is, in addition to the slaughter and destruction that ensues, guilty of the most notorious breach of trust, and for an example to others whom it may be necessary for the good of the community to trust, ought to be punished in the most severe manner. Men so trusted are under double ties, for, besides the general obligations of duty and humanity, a particular confidence is reposed in them, which, at the peril of their lives, they ought to answer.

The procurators for the pannel complained, that in the indictment he was charged with a wicked and malicious purpose of destroying, wounding, and maiming numbers of his Majesty's subjects; and by the pannel's sober and modest deportment

on former occasions, and the whole circumstances precedent to the melancholy accident now in question, endeavoured to show that he had no premeditated malicious design. But this again was to no purpose. The prosecutor never heard, nor, so far as he knows, did ever any man before this time complain of the wickedness or inhumanity of the pannel; and he has received no information by which he can be induced to think, that for any considerable time before the fact complained of the pannel had premeditated the destructive action of which he is accused. But then his procurators very well know, that firing and ordering to fire imply, and are proof of a wicked and malicious purpose of destroying those that are fired at. *Malitia* and *propositum præcedunt ictum*, in the construction of reason as well as law, and whoever wilfully murders and destroys his Majesty's subjects must be demeaned as a murderer, if his malicious purpose preceded the drawing of the tricker or giving the orders one moment, as much as if it had been preconceived a whole year.

These shews of defence, rather than defences, being removed, the next thing that comes to be considered, is the history of the pannel's behaviour, during the melancholy transaction, which his procurators offered to prove, and insisted, would, if proved, be a sufficient defence against the facts charged in the libel.

But in this the prosecutor can by no means agree, for he takes it to be extremely plain, that

every single circumstance alleged by the pannel may be true, and yet it may also be true, that he with his own hand fired, and killed one or more of the innocent people, and that he ordered the men under his command to fire.

It may, for example, possibly be true, that he, at some period or another of the action, called out to the multitude to stand off, or that he would fire; that he at some one point or another of time prohibited the men to fire, and struck down the pieces of such as were presenting them; and yet it may also be true, that he at some other point of time gave the precise word of command to fire, and actually fired the piece that was in his hand: before he lost his temper he might have threatened only, before he took the resolution of annoying, as well as after he saw mischief done, he might have endeavoured to prevent a particular act of inhumanity; but his doing so at certain periods, is no conclusive evidence, that, at other points of time, his conduct might not have been very different.

Were his giving orders, or actually firing dubious, the circumstances mentioned for the pannel might create a strong presumption for him; but if it shall be proved, as it is charged in the libel, that he actually fired the piece in his hand oftener than once, and gave positive orders to fire; what can it avail him, that, at some other periods of the fray, he behaved himself in a different manner? since both the one allegation and the other may be true.

But the procurators for the pannel insisted, that, though the proposition they undertook to prove was in some degree a negative, yet it was so circumstantiated as to be capable of a positive proof; for they said that credible witnesses could be produced, who would inform the Court and jury, that, during the whole fray, they kept their eyes upon the pannel, and were attentive to his actions; and that they could take upon them to say, that throughout the scuffle he did not fire his piece, nor order the guard to fire, but that he threatened to fire, which might by persons at a distance, who heard the word fire only pronounced, be mistaken for a command, and that he presented his piece only in a menacing posture, but without firing, which might have misled the spectators into an opinion that he did fire, though he really did not, if any one who was near him happened to discharge his shot about the same time.

This reasoning, however, is manifestly defective, because the evidence of the witnesses, who shall say they did not see or hear, bears no proportion in point of weight to the testimony of those who shall upon oath positively say that they did hear or see.

Besides the obvious reason for maintaining this distinction in the common case, there is a particular consideration that supports it, in the case of a fray or tumult, where shots are fired, murder ensues, and there is a general confusion and surprise. No one could possibly be so interested in

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keeping his eyes upon the pannel, when it could not be foreseen there would be occasion to give evidence touching his behaviour, as not to be liable to be carried off from that object, upon any fresh surprise that happened in the tumult; the firing of a shot, the flinging of a stone, the extraordinary behaviour of any one of the multitude or of the guard, might imperceptibly have drawn the eyes and attention of any spectator from the pannel to that new object, and prevented his seeing or hearing what he said or did in the mean time; and, therefore, no witness, or number of witnesses, who should take upon him or them to say absolutely, that the pannel did not at any period of the fray fire or order to fire, would at all be credible, at least, most certainly they could not be credited against such witnesses as should positively say, that they saw or heard him fire or order to fire.

If witnesses shall say against the pannel, that they saw him present his piece and fire, and for their *causa scientiæ* shall aver, that they observed fire and smoke issuing out of the muzzle of his piece, and a man drop down dead in the place towards which he pointed it, will that evidence be sufficiently contradicted by persons who may say they observed no such thing, or that others of the guard fired about the same time and at the same place? It is humbly thought it cannot, because this is setting up negative evidence only against positive, which neither law nor reason permits.

And if credible witnesses shall aver, that the captain distinctly ordered the guard to fire, can it avail him that other witnesses heard him threaten the crowd, that, if they did not retire, he would fire, without hearing the positive orders for firing given? In a tumult, every individual cannot possibly hear every thing that passes; but then it is no evidence that particular words were not uttered in a fray, that some persons present at the fray did not hear or attend to them.

And the pannel, in framing his defence on this article, does not seem to have attended to what is expressly libelled against him, that in great anger he said to the men under his command, upon their firing over the heads of the multitude, level your pieces, and be damn'd! Will this circumstance, should it be proven, be at all consistent with that part of the defence, which tends to render the expression of fire dubious? If the pannel's passion moved him to utter the expression, level your pieces, and be damn'd! is it at all doubtful in what sense the word fire was pronounced? These things are, it is thought, too plain to be further insisted on.

The only remaining circumstance, on which the prosecutors for the pannel seemed to lay stress was the condition of his firelock, when the action was over, and his voluntary presenting himself before the Magistrates, when he could have made his escape, from which they would have inferred an impossibility that he was guilty of ac-

tually firing, his firelock appearing not to have been discharged, and a strong improbability, that he was conscious of having given any criminal orders, since without necessity he freely presented himself to justice.

Now, as to these matters, it must be observed, first, that the condition in which the pannel's firelock appeared can yield no evidence for him. A piece that has been fired may be reloaded, and so cleaned and brushed up, as to leave no vestige or mark of the former firing; and the piece which the pannel made use of in firing might have been changed, and another produced to the Magistrates in the room thereof.

But 2*dly*, The indictment nowhere avers, that the pannel made use of his own piece when he fired. Where he is first charged with firing, no more is said, than that he levelled the firelock that was in his hand, and fired it at Charles Husband. Now, the firelock that was in his hand might have been that belonging to another man as well as his own. And in the other part of his indictment, where he is charged with firing, it is said that he made use of a musquet or firelock that was in his hand, having either reloaded, or caused to be reloaded, his own piece, or having taken another out of the hand of one of the guard; so that the libel in every article of it may be true, and proved; and yet it may be also true, that the pannel did not fire his own piece.

And as to the article, that the pannel, conscious

of no guilt, appeared voluntarily before the Magistrates, when he could easily made his escape, it can possibly infer no presumption for his innocence, if the facts charged in the indictment are made good. Whoever shall be satisfied by the proof, that the pannel acted in manner libelled, must be convinced, that he was governed in his actions by no principle of discretion, and must therefore lay no weight upon an act of his, which can yield no inference, unless he is supposed to have been governed by discretion and prudence.

Having thus run over the several circumstances of the pannel's narrative, the prosecutor apprehends he may safely conclude, that they cannot, jointly or separately, be sustained as a defence against the charge laid in the indictment; because, though every circumstance alleged were undeniably proved, the unhappy pannel might nevertheless be guilty, and a positive proof of the facts charged, must necessarily prevail with every unbiassed juryman, to join in a verdict against him.

The prosecutor is, nevertheless, far from wishing that the unfortunate pannel should be deprived of an opportunity of laying every circumstance that may make for his defence before the jury by proof, though he humbly insists they cannot be sustained as a defence relevant to assoilzie from the indictment. It is possible the fact may come out otherwise in the trial, when witnesses are upon oath, than it did when the examination was taken in the precognition; and should the proof of the indict-

ment be in material circumstances defective, the evidence offered for the pannel may have its weight; wherefore, so far as the forms of the Court will allow, the prosecutor makes no opposition to the indulging the pannel to bring what legal evidence he can, for the information of the jury.

It is far from being the interest of the Crown, or of the public, that an innocent man should suffer; but it is greatly the interest of both, that a fair and strict inquiry be made where the guilt lies, when a massacre so cruel and so dangerous happens, to the end that, if the officer, who has power put in his hand, for the preservation of the peace, and for the protection of the people, should, from any unjust motive whatever, make use of that power in breach of the laws, to the destruction of the people, he may be made an example to restrain others in the same circumstances, from the like monstrous and dangerous abuses in time coming.

In respect whereof, &c.

Sic subscribitur DUN. FORBES.

July 13, 1736.

INFORMATION

FOR

JOHN PORTEOUS, late Captain-Lieutenant of the City Guard of Edinburgh,

AGAINST

His MAJESTY'S ADVOCATE.

THE pannel stands indicted, at the instance of his Majesty's Advocate, for his Highness's interest, for the crimes of murder, and slaughter, maiming, and wounding; and the facts charged against him, from whence these crimes are pretended to be inferred, are these following: That the pannel being one of the captain-lieutenants of the said city-guard, was, by the magistrates of the city, ordered to attend, with a detachment of about seventy men of the said guard, at the execution of Andrew Wilson, sentenced to be hanged by the High Court of Justiciary; and that the said Andrew Wilson, having hung upon the gallows, erected for his execution, in the street called the Grassmarket, until he was dead, at least for a considerable time, and so long that there was ground to conclude he was dead, he the said pannel, conceiving a wicked and malicious purpose of destroying, wounding, and maiming the persons, inhabitants of the said city, and others, assembled at the said execution, did, without any just cause or necessary occasion, order the said detachment, under his command, to fire

upon the people so assembled; and that some of the men having fired, as it would seem the pannel apprehended, over the heads of the multitude, with intention to avoid doing them harm, he the said pannel did with threats repeat his commands to fire, calling out to the men to level their pieces, and be damned, or words to that purpose; and that, at the same time, he levelled the firelock that was in his own hand, taking aim at one Charles Husband, and, having fired the said firelock, the said Charles Husband immediately dropped to the ground, having received a wound or wounds, by bullets or large drops of lead, whereof he died in a short space; and that, by the pannel's said example and command, severals of the said guard, to the number of about twenty, did, at the same time, or soon thereafter, fire upon the innocent multitude, by which fire, two other persons were killed, and several others wounded, maimed, or hurt; and that the said pannel having thereafter marched off the said detachment of the guard into that part of the street aforesaid called the West Bow, he did again, without any just cause or occasion, order the men under his command to face about and fire upon the people; and that, at this time, the said pannel did fire a musket that was in his own hand, having either reloaded, or caused to be reloaded, his own piece or firelock, or taken another out of the hands of one of the guard; and that severals of the said guard did, upon that second example and command of the pannel's, fire upon the multitude, by which fire three other persons were killed; at

least that, by the said firings of the pannel, or of the firings of the other men in the said detachment of the guard, proceeding from the pannel's order and example, the several persons mentioned in the indictment to have been killed, maimed, or wounded, were all respectively killed, wounded, or maimed: Whereby the pannel is guilty of the killing, wounding, or maiming of the said persons; at least is art and part thereof, or accessory thereto; from whence the indictment concludes, that the pannel ought to be punished with the pains of law, *i. e.* capitally.

To this indictment the pannel pleaded not guilty; for that he had, at no time during the execution of Andrew Wilson aforesaid, given any order, or shewed any example to the said detachment of the guard then under, or that ought to have been under his command, to fire upon the multitude so assembled; and that he did, at no time, fire any piece or firelock himself upon the said crowd; that though it might be true, that at or about the time of the said execution, several persons were killed and wounded by the firings of that detachment of the guard, which indeed ought to have been under the pannel's command, and which he does, with great grief and sorrow, regret, yet that, as such firing proceeded wholly from the men in the said detachment, without any order or example from the pannel, so he could not be charged therewith, however fatal or tragical the consequences of such firing may have proved.

That though the pannel, as conscious of his own

innocence, could safely rest his trial upon the denial of the facts aforesaid, and upon such proof as he could bring, by the evidence of multitudes of persons of undoubted credit who happened to be present, close by him, during this unhappy scene, that he was nowise instrumental in the killing or wounding the said persons, but that, upon the contrary, he did all that was in his power to prevent and restrain the said firing upon the multitude; yet, that he was advised by his counsel, that they could not, during the conducting of his trial, consistent with their duty, suffer him, the pannel, to omit or abandon any defence that was competent to him in law; and that, therefore, as, by the law of Scotland, the pleading to an indictment, upon supposed facts, is no legal admission of such facts, the pannel was at liberty to plead any other exception that lay against the form of his indictment, or even to plead, that, though such firing had proceeded from his order or example, yet, even in that case, such firing, and the consequences wherewith it was attended, was not sufficient to support the charge against the pannel of the crimes of either murder, slaughter, maiming, or wounding, or to render him obnoxious to the pains libelled.

And in the entry of the debate, the procurators for the pannel ask liberty to offer to the Court a full recital of the behaviour of the pannel, during the execution of the said Andrew Wilson, and for some short space previous and subsequent thereto; and also, to offer a short relation of what they apprehend was the cause that the execution of the

said Andrew Wilson was attended with such an unusual confluence of people, and was ordered to be guarded and overseen by such a numerous and unaccustomed armed force.

The said Andrew Wilson, along with one Robertson, and others, had been sentenced to death by your Lordships, for robbing one of the collectors of his Majesty's revenue of considerable sums of money of the public; and while they lay under this sentence, they were allowed, as usual, to go to the church adjoining to the prison, for the benefit of divine service, under the custody of a small detachment of the city-guard; and while the convicts were thus at church, Robertson, one of them, found means to escape from his keepers of the guard, by suddenly jumping over a pew, and getting out at the door of the church, his retreat apparently being favoured by the mob, or lowest sort of the people, he easily made his escape, without having been ever since overtaken.

From this escape of Robertson's, so favoured by the mob, and from strong surmises and suggestions, that, at the execution of Wilson, a rescue was intended by the mob, which indeed there was a reasonable ground to apprehend, because the commons have imbibed a pernicious and absurd conceit, as if the robbing of the public money was a crime more pardonable than private robbery. Therefore it was, as the pannel apprehends, that the magistrates of the city, from a sense of their duty, to prevent the execution of the laws being any further defeated by the rescue of Wilson, took

the strongest precautions that the execution of him should be made effectual.

In consequence whereof, as would seem, the provost of the city sent for the pannel, in whom, he must take the liberty to say, confidence was generally put upon those difficult occasions, and told him, that there being great apprehensions of a mob at Andrew Wilson's execution, that therefore there was a necessity to be well prepared to prevent their designs; and for that end, that he would have the whole city guard to attend at the execution, he having given orders to the town-treasurer to furnish the men with powder and shot, and such other military ammunition as might be necessary for the use of the men in maintaining the peace of the town, and supporting the execution of the laws. And this conference with the provost happened upon the Monday preceding the execution of Wilson, which followed on the Wednesday thereafter. But it seems the magistrates of the city, not thinking even this precaution sufficient, upon the Tuesday thereafter, the provost sent the pannel with a letter to General Moyles, residing near the city, and chief commander of the forces in Scotland, telling the pannel, that the import of this letter was, desiring from the general an order for a party of the regiment lying in the Canongate to enter the city, (a thing very uncommon, except in the case of urgent necessity,) in order to overawe the mob, and thereby maintain the peace during the said execution.

It seems this letter to the general induced him

to send a verbal message in return thereto, by a person of known honour and veracity, Major Pool, of that regiment now lying in the Canongate, who told the provost that the general wanted to know of him what part the King's troops were to act, and what precautions had been taken for preventing any insult or invasion that might be made upon the troops, or what length these troops might go in the case of tumult or disturbance. To which the provost made answer, that there was no reason to apprehend any inconveniency would happen to the King's troops, because he would have them only to parade, for a terror to the mob, in a street called the Lawnmarket, removed from the sight of the execution, but at a small distance only, where, nevertheless, they would be ready at a call in case of necessity; but that he had ordered the whole band of the city-guard to attend at the execution itself, with proper arms and ammunition, namely, slug-shot, with orders to repel force by force, and even to discharge their arms among the mob in case of resistance.

On Wednesday, the day of the execution, in the forenoon, the pannel attended the provost, and told him, that, in obedience to his commands, the men were all ordered to be in readiness, their arms put in order, and loaded; whereof the provost approved, and told the pannel, that he was to be ready betwixt two and three in the afternoon with his guard, and to draw out until the party of the King's troops from the Canongate past him; and

that so soon as the King's troops were drawn up in the Lawnmarket, the pannel, with the city guard, should forthwith march to the prison, and conduct the prisoner to the place of execution, without allowing him first to go to the town's council-house, as usual, still with intention, as would seem, to prevent any opportunity of rescue, or disturbance upon that head; and at this time in the forenoon the pannel humbly proposed to the magistrates of the city, that they would send a proclamation through the town, as a caution to such innocent unwary people, as might by curiosity be drawn to the sight of the execution, warning them of their danger, in case any disturbance should happen, or attack be made upon the guard. And, accordingly, George Lindsey, one of their clerks, made a scroll of the said proclamation to be sent through the town; but for what reason it was not proclaimed the pannel knows not; and, at the same time, the pannel remembers some one or other of the common council of the city proposed, in case of disturbance, the reading of the riot act, and for that purpose sent for a dozen of copies of the act to a bookseller's shop, in order to distribute them among the proper officers of the law authorized to read and proclaim such act; but it seems at no time either of those proposals were put in execution; nor at the time of the said execution, did any officer of the law, authorized to proclaim such act, attend with the pannel.

A short space before the pannel marched with his men from the guard-house towards the place

of execution, he was heard say, that he had no cartrages in his box; on which a corporal told him, that he would get him some; and accordingly the corporal did, in presence of several of the men, open the pannel's cartrage-box, wherein it was observed there were no cartrages, and put three cartrages therein, with one of which the pannel loaded his piece, and immediately marched away with the men.

When the criminal was conducted to the scaffold erected for his execution, the detachment of the city-guard were posted on the street, in a circle surrounding the scaffold, in order to keep off the mob; but because of a certain building, called the Cornmarket, nigh adjoining to the scaffold, part of the men did also encircle that building. And here it may not be improper for the Court to cast their eye upon a plan of the ground, and the posture of the men, in order to have a clearer view of the descriptions to be hereafter mentioned.

So soon as the criminal was thrown over the ladder, and so left hanging upon the gibbet, the city bailies immediately withdrew nigh to, directly opposite, and in view of the scaffold, but without leaving any order or officer of the law to attend with the pannel; and it had happened, that some short space before the act of execution, while the minister was assisting the criminal by prayer, the pannel had gone up to join, leaving his piece with the serjeant; and so soon as public prayer was ended, or some short time after, and the convict left

to his own private devotion, the pannel took back his piece in his hand, and afterwards came off the scaffold, and posted himself at the west end of the detachment of the guard.

So soon as the convict had been hung up as aforesaid, and that the city bailies had withdrawn from the scaffold, the mob became to be troublesome, intending, as would seem, to use this last shift, immediately to cut down the criminal, and endeavour to bring him to life by bleeding; an expedient which, when timeously applied, has, on many other occasions, been known to be attended with success; and the mob fell a murmuring, that they would have him instantly cut down, and if it were not quickly done, they would do it themselves; and at this time they pressed hard upon the guard, striking at them with sticks, seizing of their fire arms and bayonets, and throwing exceeding big stones at the guard, one whereof cut a drummer to the scull, another broke one of the men's shoulder bones, another wounded one of the men's legs, and several others of the men were wounded, whereby they are yet unable to do duty. The truth of all which can be attested by their common surgeon, who is by the city ordered to attend them upon all exigencies.

This insolence in the mob alarmed the pannel, and still observing it to increase, he was apprehensive that the mob might obstruct the perfecting of the execution; for no criminal can be cut down from the gibbet but upon the order of a city bailiff,

upon a judgment that the criminal has hung up until he is completely dead, agreeable to the sentence which always commands such convict to be hanged until he be dead; therefore it was that the pannel sent a message to the bailiffs to know if he should suffer the criminal to be cut down from the gibbet, who brought back an answer, that the convict was to hang there yet for a quarter of an hour.

At this time the mob waxed exceeding bold, became very turbulent, and prest hard upon the guard, and while the pannel was endeavouring to keep off the crowd from pressing among the soldiers, at one end of the scaffold some of the convict's friends, assisted by the mob, catched an opportunity and cut him down without any order. And though the convict, being thus cut down, was in the possession and keeping of the mob, who were endeavouring to recover him to life, by causing the veins of both arms to be opened; whether it was that they were apprehensive that the guard would recover him out of their hands, as having been cut down without order, or that the officers of the law were designed to see to his interment, and that he was executed to death; or that the convict's body was intended to be given to be anatomized by the surgeons, as is sometimes practised where persons of low degree, or notorious offenders, are sentenced to death; or from whatever motive it proceeded, the mob began to insult and attack the guard; and upon this attack it was, that the man aforesaid had his shoulder blade broken, and another so bruised, that he has been

never able to do duty since; and the timber of the drum was broke by the force of an exceeding large stone that was thrown, and several others of the men were hurt and wounded.

This violence in the mob so alarmed the pannel, that he made a step or two forwards to the westward of the scaffold, turning about his face towards the Westport, from whence the throwing of the stones mostly proceeded; and having put his piece to his shoulder, he levelled it at the mob, and pointing it around to them, threatening with an audible voice, that if they would not be at peace, and leave off throwing stones, and attacking the men, he would fire among them; but immediately recovered his piece without firing it; the threats being only intended to intimidate the mob.

But unfortunately upon this ensued the whole tragical scene; for no sooner had the pannel stept forward, threatening to fire as aforesaid, but one of the men came up from behind him, and running by him upon his right hand, instantly discharged his piece, upon which one of the crowd dropt down, supposed to be Charles Husband, and which Charles Husband will, upon proof, be found to have been the person who tumultuously stept in and cut down the criminal.

Immediately upon this first fire, another of the guard came up to the pannel, with his piece presented and cocked, and asked if he should fire, to which the pannel answered with some vehemence, No, by no means, and struck up his piece, bidding him go to his rank, and actually thrust him thereto.

After the example of this first fire, several more of the men were heard to discharge their pieces, but upon what provocation the pannel cannot tell, these shots having been at a considerable distance from the pannel, proceeding, as is supposed, from such of the men as were standing at the south-west corner of the Cornmarket; whereas, as has been noticed, the pannel was still standing at his former station to the west of the scaffold and gibbet.

The pannel not knowing the fatal consequences of those shots, but suspecting, however, that mischief would happen, seeing the men had been so rash as to fire without orders, thought it was the best course he could take to lead off the men of the guard as soon as he could; and for that end he called aloud to them to follow him, and after having given orders to the serjeants to gather them together, (for it was impossible to bring them into ranks by the confusion of the mob,) he marched off as many of them as he could find, by the north side of the scaffold towards the foot of the West Bow, and towards a parcel of the men whom one of the serjeants had got together at the foot of the Bow, but as he was going to join that parcel of the men, he heard a piece fired near him, with which he was a good deal surprised, and yet more, when he observed two or three people fall to the ground, and which observation was the first thing that greatly alarmed the pannel, as knowing from thence that certainly mischief was done; but it is certain that this fatal shot did not proceed from the

pannel, but from a certain man in the guard that can be well proven, who, after having fired this shot, immediately retired amongst the crowd, and then got himself joined to the party. And surely the magistrates of the city will remember, that when a precognition was taking of the several facts and occurrences upon this tragical day, that a certain person told them, that if they would be pleased to sist the whole band of the guard before them, he would point out the man who made this last fire, but the magistrates overlooked this offer.

As soon as the pannel saw there was no restraining the men from irregularities, he marched off so many of them as he had got together, without taking time to form them into any order, giving orders at the same time to the serjeants to beat and press off the rest with all manner of dispatch. Upon which he observed those that had straggled come off partly from about the scaffold, and partly from the east end of the Cornmarket, and fall into the rear; and while the pannel was thus marching up the Bow upon the front of the foremost part of the men, and had come as far as the turn of the Bow, he heard some dropping shots firing in the rear, and about thirty or forty paces distant from him, which he supposes may have proceeded from those men who were straggling upon the east side of the Cornmarket, nigh to the head of the Cowgate, but upon what occasion the pannel knows not, but being alarmed with the shots, he looked back, supposing the men might be attacked by the mob, and observing no marks of any such attack,

he thought the most prudent course he could take was forthwith to march off the men.

It falls here to be noticed, that all this firing, from first to last, and whereby so much mischief has been done, lasted not above two or three minutes; and, therefore, considering the violence of the mob, and the straggling situation of the men of the guard; and supposing the truth of the above narrative, which will be attested in proper time by the oaths of many gentlemen of undoubted veracity, and who had fair opportunity of observation at the time, it is left with the Court, and to every impartial bystander, whether the pannel could well have done more for the safety of the burgh; considering that it shall also be proved, that, during these few minutes of firing, accompanied with great hurry and confusion, the pannel gave several repeated orders to the men to restrain from firing; but observing those orders prove ineffectual, he endeavoured to sweep them off the field with all manner of precipitation.

The pannel marched on with the men to the guard-house, and as he thinks with coolness and deliberation, passing by the King's troops in the Lawnmarket, (a thing generally esteemed somewhat inconsistent with guilt, especially such horrible guilt as he is charged with.) Upon his arrival at the guard-house, he drew up his men there, sending a serjeant to the provost for orders, which were brought, that they should wait on their arms till the King's troops past; and some of the men in

waiting, offering and attempting to clean their guns, but the pannel discharged it, and would not allow it to be done. Mean time a certain person of credit came up to the pannel and asked if he had fired? To whom he made answer, he had not; but the person not being satisfied with the answer, put his finger into the muzzle of the pannel's piece, and after having rubbed it about, and after having also viewed the lock, said to the pannel, I see you have not fired, and I am glad of it.

The King's troops having passed the guard, the pannel filed off the men into the guard, and ordered the serjeants to keep them close till further orders, and by all means not to suffer them to clean their pieces: and at the same time the pannel delivered his carabine, loaded as aforesaid, at the guard door, to one of the guard, neither entering the guard himself, nor any other house, but went immediately to the provost; thus his own piece was brought back loaded, and apparently without having been fired, and the other two cartrages which he had got at the guard were found upon his return in his cartrage box.

When the pannel went up to the provost, some person there present alleged he had seen the pannel fire, which he contradicted, and begged the provost to send for his piece, which he told he had delivered at the guard as aforesaid, and that it would appear from inspecting of her, that she had not been fired: and the piece being accordingly sent for, and brought up to the council chamber,

and after being strictly inspected, it was agreed by all present that she had not been fired; and in this condition she still lies loaded, in the custody of the magistrates, along with the cartrage box, containing the two cartrages, as aforesaid.

Though the pannel has a pretty important prize at stake, yet he rests in full security, that he will prove to the conviction of the Court every article above recited, and a good deal more in his behalf, to be hereafter mentioned; and if it should here be made matter of wonder how such different accounts as are given of this matter can consist together, seeing numbers of people are impressed with the guilt of the pannel, and that even good well meaning people, who were present upon the spot, persist in affirming that the pannel was guilty, by both firing himself, and giving repeated orders to fire.

The pannel can give no other account of this matter than in this way. A miserable slaughter was, some how or other, committed within the town. The guilt must be laid to somebody's door; and whether any art might be used to lay the heavy load upon the pannel, in order to draw the attention of the multitude from another point in view, the pannel shall not say; but entreats the Honourable Court, and every candid reader, who may happen to take up this information, to look into the Caledonian Mercuries of the fifteenth and nineteenth of April last, papers supposed to be published by authority; where will be found a

most charitable account of the matter, touching this misfortunate pannel, who was then lying in close confinement, without any body being allowed access to him; and, of consequence, could have no opportunity of vindicating himself, until once the prejudices were deep rooted and rivetted, so as even to catch the unwary, though well-meaning, part of the people; and these beautiful relations of this transaction are adorned with some witty sarcasms, very proper to this melancholy occasion, and painted out with ingenious reflections, and quaint rhetorical invectives, very suitable to the authors of these historical relations.

And indeed the authors of these accounts of the matter, whoever they are, have the impudence to affirm, and the wickedness to endeavour to fix it upon the pannel, as an instance of premeditation and felony forethought, that the pannel had ordered the detachment of the guard to load with ball and slugshot, before they marched from the guard. And this worthy author affirms, that such doing was unprecedented, and such as the pannel would not pretend orders for; notwithstanding that it is now, with his usual candour, admitted by his Majesty's Advocate in his information against the pannel, and dare not be denied, but that the pannel had orders to see the whole men's pieces loaded with bullet and other shot, and even to fire those pieces amongst the mob in case of exigency.

The prejudices against the pannel being once

artfully rooted, it was an easy matter to catch the giddy mob, who are not able to look back and discern the true springs and causes of things: for such is the nature of human passions, that if they are once artfully moved, they will be apt to misguide the understandings, even of persons of observation; and thus the speat having once been created against the pannel, it grew into a torrent, and flew like a train of fire, every one adding fuel to the flame, and sparks originally increase into a mighty combustion; and so, in like manner, things entirely of themselves innocent, may be multiplied into horrid cruelties and savage barbarity.

It might also operate to the prejudice of the pannel, that this scene was acted in a very short space, attended with great commotion and confusion Words and actions might be misconstrued, (whereof more particular notice shall be taken hereafter,) whereby persons, even of judgment, might be deceived, and thereby fall into the vulgar notions. And here it cannot be deemed an useless digression in the pannel to give a caution to all gentlemen, who may happen to be called in evidence upon this trial, (for it is feared the mob are not capable of this advice,) not to affirm things upon oath, except their observations have been accompanied with all that certainty which those sensations wherewith mankind is endued, can admit of; because any inconsiderate rashness to the prejudice of the life or fame of the pannel, cannot fail,

for hereafter, to be attended with very painful stings of remorse.

It was observed for the pannel, as a thing that could not be denied, that, upon many former occasions, he had been singled out as the fittest person to maintain the peace of the city, by quelling of mobs and tumults; and that he had never hitherto fore, during all the many occasions on which he had been employed, ever discovered any imprudent rashness or cruel temper in the exercise of his command, but had exposed his person to very great danger, rather than involve the city in blood, or proceed to such extremities as the law even would have entirely justified.

It was also observed in behalf of the pannel, that it was no new thing for the private men in the city guard, who, though they are tolerably acquainted with discipline, yet are not subject to the military law, to take upon them to fire upon the multitude, without any order from their commander, whereof the following instances are offered, and which cannot be denied; to wit:

That at the settlement of Mr Wotherspoon as a minister in the West Church parish, a party of the city guard under the pannel's command did, one or more of them, in the rear ranks, within the west gate of Edinburgh, while the pannel was marching on their front, face about and fire upon the mob, without any order, and by which fire severals were dangerously wounded; and the like happened in a few years ago, after the execution

of one Campbell, when a detachment of the city-guard were conducting the corps of the person executed, which was delivered over to the surgeons of Edinburgh, by order of the magistrates. And the same thing happened a few years ago at a race at Leith, where the party of the guard was commanded by Captain Lind, whereby several persons were wounded. And another instance was given, where the same irregularity happened, within these few months, at the execution of Brown the smith, when the detachment of the city guard was commanded by both captains Lind and Ferguson. And, indeed, innumerable other instances might be given of the rashness of the men in this particular, which it is needless to condescend upon, because they are notourly known in the city.

It may also deserve notice, that the private men of the guard might be prompted to fire without orders, partly from resentment, that Robertson before mentioned had escaped out of their hands, and partly from being encouraged by the general order they heard was given by the magistrates to fire in case of resistance: For it is now found, that severals of them were heard say before they went out to the execution of Wilson, that now they had got arms and ammunition put into their hands, and therefore would not fail to use them, in case they were attacked, or any resistance made.

These observations, it is thought, cannot fail to operate in favours of the pannel, in case the proof

of the libel shall be attended with any uncertainty or dubiety: and although the pannel is not so weak of judgment as to imagine that such presumptions can prevail against positive and certain proof, yet he doubts not, that in due time, when the proof is led, such observations must have weight with the candid jury.

One thing more we must observe in general, that as he has been employed for these many years past as the scourge of the mob, though never once known to proceed to extremities, yet such station of his may be the cause of drawing resentment from the lower sort of the people against him.

The pannel has just reason to ask the forgiveness of the Honourable Court for dwelling so long upon generals; but it is hoped, from what is above noticed, and that this is the first occasion he had of vindicating himself from the aspersions and prejudice of his adversaries, he may merit the pardon of the Court.

And now to proceed to the particulars in the indictment: And whereas it sets forth, That the pannel, conceiving a most wicked and malicious purpose of destroying, wounding, and maiming, numbers of his Majesty's subjects, inhabitants of the city of Edinburgh, had acted the several matters and things charged in the indictment: the pannel must observe, that the circumstances of the case naturally exclude any supposition of premeditate malice and resentment in the pannel, because it is impossible to conceive that the pannel should

have retained any malice against a multitude of persons, of whom he neither had, nor can be supposed to have had, any acquaintance; and though it was admitted, that the circumstances of the case do exclude any supposed long premeditated malice, yet it was urged, that in law every wicked action does presume malice, though instantaneous to such wickedness committed.

To which it was answered in behalf of the pannel, That the circumstances of the case, as laid in the indictment, do even exclude any presumption of malice accompanying the acts charged in the indictment; because every action must be construed in the most favourable sense; and therefore the actions charged against the pannel must even be construed to have proceeded from a principle of duty in the pannel, in maintaining the peace of the place, and in supporting the authority of the laws, and the guarding of that execution of them, which was committed to him by lawful authority.

In the next place, an exception was taken to the indictment, as not having been laid with sufficient certainty; the indictment nowhere expressing the particular places of that large street wherein the guilt is charged to have been committed, whereby the pannel was precluded from making his defences with certainty; for had it been laid in the indictment at what places in the street the particular persons, affirmed to have been killed and wounded, were so killed or wounded, the pannel might have had an opportunity of proving, from the circumstances

of his situation at the several periods, that it was impossible that such wounds could have been received from his hands. And though it may be true, that such part of the indictment as charges the pannel's order to fire would be of universal influence, and reached over the whole circumstances of guilt charged in the indictment, yet as actual execution made by the pannel was charged separate from his order to fire, such proof of innocence, whereof the pannel pleaded an opportunity might have afforded him a defence against such part of the indictment as charges his own firing and killing.

To this it was answered by his Majesty's Advocate, That the libel was as particular as the law required, describing the street where the execution was committed, which is all that the utmost scrupulosity could expect in this case; because minute circumstances cannot be known to the prosecutor, or certainly discovered, but by proof upon trial, and that every circumstance of the pannel's own acting must be known to him. And, therefore, if, from the position or situation in which he was at the time of the firing, the pannel can show that it was impossible he could have killed the person whom he is charged to have shot; by describing and proving these circumstances he may have advantage from them, but cannot object to the prosecutor, that he did not minutely describe his situation, which was not known to him; and that, by the describing of which, perhaps erroneously,

the prosecutor might minister an unjust occasion to a criminal to escape justice.

To which it was replied for the pannel, That though it is true, that, in most cases, the describing the street where the guilt was committed would be a sufficient description, yet that, in the present case, where it was laid in the indictment, that in a crowd or multitude, various shots were fired by different hands, and thereby wounds given, it is even necessary to describe the particular place of the street where such wounds were received, in order to form a judgment from whose hands those wounds had proceeded. The pannel might have fired elusory, or in the air, and the wounds received may have proceeded from the shots of others. That though the pannel knows his own position and situation, and can prove them, yet such proof could not avail him, nor be received by the Court in the point of relevancy, because it would be a simple negative, which could not be admitted of, nor would not apply, unless the particular places of the street in which the wounds are said to have been received had been described to him, a situation which the pannel cannot be supposed to know; whereas the prosecutor must be supposed to have known it, seeing the same information that led him to know of the wounds received, must necessarily upon inquiry have certiorated him at what places of the street such wounds were received, seeing the matters and things laid in the indictment are charged to have been committed at high daylight,

in presence of multitudes. And though the pannel is fully satisfied of the good disposition of the honourable prosecutor to lay a fair and certain indictment against every pannel, yet it must be admitted, that all indictments ought to be laid with all that accuracy and full description that the nature of the thing can admit of. And, as to such part of the answer for his Majesty's Advocate, as saith, that such particular description of place, if perhaps erroneously described, might minister an unjust occasion to the pannel to escape justice, it is answered, that such erroneous description of place could in no sense affect the trial, because, though such description should not be proved, it would not vary the case, providing the act of killing were proved against the pannel, because such description of place is but a circumstance immaterial to be proven by the prosecutor; but, for the reasons above assigned, highly material for the pannel to know, in order to lay his defence before the Court.

It was in the next place offered as a defence for the pannel, That the resistance of the mob was so great, and the attack of the city-guard so violent against them, in beating, bruising, and wounding the men, as has been above noticed, while they were in the lawful execution of that office, committed to them by lawful authority, that such resistance and attack must have justified the guard in repelling the violence of the mob; since such proceedings in the guard were acted in support

of the due execution of the laws, which the mob were highly criminal in disturbing. That this argument, as pled for the pannel, was not only consonant to the rules of reason, but agreeably to sundry judgments and precedents of the Court, particularly that, in the year one thousand six hundred and ninety-two, it appears from the books of adjournal, that James Gordon, messenger, at the execution of a caption, did, with many others, his assistants, armed with guns, swords, and other hostile weapons, shoot several shots, whereby one Alexander Jack was killed dead upon the spot, amidst a numerous crowd, which the alarm of noise and tumult had drawn together, and whereof only part can be supposed to have come there with intention to resist the messenger; and the said James Gordon, and the others, his assistants, being indicted for murder, the Lords sustained this defence to him, relevant to elide the libel simply, viz. That he, in the execution of a caption, having his blazon displayed, was by force of arms hindered to enter the house of Loanmy, by the persons within that house, and that they did threaten and menace the messenger and his assistants, and that they threatened to raise the country, and that the country did accordingly rise, and beset and surround the messenger, either in the house, or without the house; the said country people being armed with guns, swords, and other invasive weapons.

Here your Lordships perceive, that the Court

justified the messenger in shooting amongst the mob, and killing; because the persons in the house forcibly hindered him from entering, and threatened and menaced him, being armed with invasive weapons; and the present case is more favourable in behalf of the pannel, who acted by lawful authority, as well as Gordon in the other case did, and who was supporting the execution of the laws as well as Gordon was; with this difference upon the side of the pannel, that he was not only hindered and menaced in the execution of his duty, but he and his guard invaded and assaulted, beat, bruised, and wounded, as has been above noticed, and whereof a strong proof shall be brought; and that the mob in the present case were not only armed with, but in their attack upon the guard, made use of big stones, of two or three pound weight, which must be allowed to be very invasive weapons; and therefore the pannel subsumes, that the defence offered for him in the present case is stronger, and ought rather to be allowed him, than that which was sustained to Gordon. Only the pannel must do the justice to his Majesty's Advocate as to acknowledge, that this precedent was not hitherto offered in the debate; but when the record is inspected, will be found to stand in the precise terms as above mentioned.

There was, in a former debate, a precedent of the Court offered, as against the pannel, which the pannel, with submission, apprehends makes for

him, namely, Captain Wallace's case, sometime after the Revolution. Captain Wallace was indicted in the one thousand six hundred and ninety two, for having refused in the one thousand six hundred and eighty-eight, to deliver up himself, in obedience to an order of the president of the council, and several privy councillors, whereof two were officers of state; and the bailiffs of Edinburgh, having gone down to the Canongate, with a herald and pursuivant, with their coats of arms displayed, to put the order of privy council in execution; notwithstanding which, Captain Wallace would not deliver himself up, but retired with the men under his command to the Abbey, and defended himself, and fired upon the bailiffs, heralds, and pursuivants; shot several persons dead upon the spot, and wounded a great many others.

The defence pled for Captain Wallace was, That the keeping of the Abbey was committed to him by order of the privy council, which he was obliged to maintain so long as the trust of it was committed to him: That as to the order of privy council to deliver up his person, it was contrary to an act of parliament James the Sixth, whereby any general warrant for putting the person of any man in ward, except where such warrant was signed by four officers of state, whereof the chancellor, treasurer, or secretary of state to be one, which had not been practised in Wallace's case, was prohibited and discharged.

The Lords, after a very learned debate, did sustain these defences to Captain Wallace, viz. that on the Sabbath night, or shortly before, a rabble did meet in several places in great numbers, and that several of them did declare to John Paterson their resolution to trouble the pannel on his guard, and to pillage the Abbey, relevant to restrict to an arbitrary punishment.

Here your Lordships perceive that the Court sustained a previous intention only declared, that they would trouble the pannel on his guard and pillage the Abbey, sufficient to moderate the punishment; so tender are the laws towards any person committing hostility in defence of his guard. And then the Lords sustained the following defence relative to elide the libel altogether, to wit, that the rabble did, in a tumultuous manner, come down the Canongate with swords and fire-arms, and did beat some of the pannel's centinels; and being desired to stand, they notwithstanding advanced so near that the pannel could speak with them; and after he had desired them to remove or be at their hazard, they, notwithstanding thereof, still persisted to advance.

The application in the present case is easy. The pannel many times exhorted the mob to stand off, notwithstanding of which they still pressed upon him; he many times advertised them of their hazard, threatened to fire upon them if they would not keep off; his centinels were not only beat, but

bruised and wounded; all which is offered to be proved.

Another case was mentioned in the debate to your Lordships, which strongly supported the plea of the pannel, because it was a judgment of your Lordships, pronounced but very lately after the most solemn declaration of the Court, and wherein, the pannel is informed, the Court was unanimous; and which judgment seemed to be of that importance, as to induce the Court to reverse the proceedings of the High Court of Admiralty after a solemn trial by jury in that Court; a verdict returned, finding the libel proven and the defence not proven; and a sentence of death pronounced by the Judge of the High Court of Admiralty.

The case before the Admiralty was this. A corporal and a private centinel in Colonel Hamilton's regiment were indicted before the Admiral for murder, for that they had, upon the high seas, killed Hugh Fraser, younger of Belnain, by stabbing him with a bayonet in the breast, and afterwards throwing him into the sea, whereof he instantly died.

The defence pled for the pannels was this, that the pannels were by military order appointed to attend the officers of the customs in seizing of goods by law made seizable; and that the pannels being in a boat upon the seas along with the customhouse officers in quest of such goods, the person killed did come up with them in another boat, with others in company with him, and that Fraser, the

deceased, jumped into the boat where the pannels and the customhouse officers were, and endeavoured to take hold of their arms, which was both a resistance and an attack of the customhouse officers, while in the execution of their duty.

Upon the other hand, it was pled against the pannels, that Fraser's jumping into the boat was with no intention to make resistance, but rather to save his own life from the thrusts of the pannels, their pieces having been aimed at him; that those in the customhouse boat could have no just apprehension of being mastered by Mr Fraser, he having no invasive weapon about him whatever, and being the only person who offered to get into the customhouse boat, in which there were several persons well armed.

The Judge of the High Court of Admiralty admitted of the pannels' plea, in this manner only—sustains the defence of self-defence proponed by the pannels, that the killing of the said Hugh Fraser by them, or either of them, was in the necessary defence of their lives, and repelled the whole other defences proponed for the pannels.

The jury returned their verdict, finding the pannels both guilty, art and part, of killing the said Mr Fraser; and finding it not proven, that the killing of Mr Fraser was in the necessary defence of the pannels' lives; upon which verdict returned, the Judge sentenced both the pannels to be hanged.

The proceedings of the Court of Admiralty were

laid before your Lordships for a review, which, it is believed, is the single instance wherein it was ever contended, that the proceedings of the High Court of Admiralty in matters criminal could be reviewed by any other Court.'

Notwithstanding of which, your Lordships were pleased to reverse the sentence of the Judge-Admiral, no doubt upon supposed error in his proceedings; because the verdict of a jury, pronounced upon evidence, cannot be reversed, and in consequence of which judgment of your Lordships the pannels were set at liberty.

Now the pannel is advised, that such judgment in your Lordships could stand upon no foundation other than this, viz. that your Lordships had reversed the judgment of the Admiral as erroneous, in not sustaining this defence to the pannels; that they were resisted by Mr Fraser deceased, while they the pannels were in the execution of their duty.

And as the degree of resistance offered by Mr Fraser to the pannels was by the pannels themselves maintained to have been no higher than what has been set forth to your Lordships, the foresaid unanimous judgment of your Lordships, pronounced after many solemn deliberations, does by consequence show, that it was your Lordships' unanimous opinion, that a very small degree of resistance of persons in the execution of their duty will justify the persons resisted in the act of killing the resister.

And if that was the solemn and unanimous opinion of the Court in a case so recent, must not such judgment afford a strong argument to the pannel, that he and his guard were resisted, while in the undoubted execution of their duty, in being beat, wounded, and bruised by an unruly mob, who, there was good reason to apprehend, intended to defeat the execution of the criminal?

To this last case the pannel met with no other answer from his Majesty's Advocate but this, that the pannel cannot plead the benefit of this case, because he neither does nor can aver that the firing proceeding from him or his order was necessary for securing of the execution of that trust that was committed to him. His Majesty's Advocate does admit, that where a person has by lawful authority weapons put into his hands, to be employed either in defence of his life when attacked, or in support of the execution of the laws, or of the property of the Crown, or property of the subject, such person may use those weapons, not only when his own life is so far in danger that he cannot probably escape without making use of them, but also where there is imminent danger, that he may by violence be disabled to execute his trust; but withal seems to contend, that the pannel was under none of those circumstances at the time he committed the guilt charged upon him in the indictment; for that the execution of the criminal was over before the scuffle began, or any resistance was made to the pannel and the guard under his com-

mand; and that being the case, the pannel can plead no other defence than such as might arise from his being put under the imminent danger of his life.

But with great submission, these positions of his Majesty's Advocate are assumed without any authority, and, as would appear, not only in plain opposition to the laws, but to the many precedents already offered in behalf of the pannel; for it is hoped it must be admitted, even by my Lord Advocate himself, and is indeed so admitted by him, that the pannel was once in the lawful execution of his duty, and was obliged at all hazards to support the execution of that criminal who was committed to his guard; surely then, the execution of the pannel's duty can never be said to have been at an end until once the criminal was fully executed to death, and as such, ordered to be cut down by lawful authority; unless it shall be said, that it was the pannel's duty, the moment the convict was hung up, to let him instantaneously be cut down, rescued by the mob, and brought to life again; which seems to have been their plain intention. For it seems to be confessed upon all hands, that there was danger of a rescue, which seems to have been the occasion of all this extraordinary apparatus; and for preventing of which it is admitted, that the whole guard was sent out with their pieces loaded, and even with orders to fire at all ventures in case of such rescue. Was it not then a necessary part of the pannel's duty to protect and sup-

port the execution of the convict, when hanging by the neck in the air, until such time as he was cut down by lawful authority as supposed fully dead? And it is certain that in answer to the pannel's message, orders were brought him from the bailiffs that he should yet hang a quarter of an hour, which surely it was the pannel's duty to see obeyed, and which orders of the bailiffs the mob nevertheless did resist, and cut down the criminal long before that time was elapsed, and which the pannel was in duty bound to oppose; and from this contrast, it is offered to be proved, all the violence in the mob proceeded. But can it be with any justice affirmed, but that the pannel was in the execution of his duty, while he and his guard were standing upon the spot under arms? Is not every person in the execution of his duty while he is either going to, or coming from any lawful expedition? and, therefore, it seems impossible to maintain, but that the pannel, and the detachment under his command, were in the lawful execution of their duty, until they had once returned, and were dispersed and dismissed from duty, at which time only they were reduced under a private capacity.

And even the protection of the hangman, who had actually received several wounds and contusions, and was in danger of being tore to pieces by the mob, was a part of the pannel's duty. For though he is a minister of the law somewhat odious, yet he is a necessary one for the society,

and lies under a greater necessity of being protected, from his being so obnoxious to the resentment of the mob; and, at least, in humanity, must have such protection afforded him as to defend him from having his brains knocked out.

How then can it be said, in any sense, that the pannel was in such situation that he could only plead the benefit of self-defence? It is a known rule in self-defence, that a person invaded must retire as far as he can with safety. But if that is the case of a city guard, (maintained at great expence,) that so soon as they are invaded, they must immediately betake themselves to their heels, it will be apparent, that they are but kept up for very useless purposes.

At the same time the pannel can with great candour aver, that he is far from being of that disposition of mind, as to be ready to take the advantage which the law might afford against an unruly giddy mob, whereof he has given proof upon many former occasions, as must be allowed him, and whereof even the present case will be an instance in his favours, if he meets with justice from the evidence. But withal, he must be allowed to observe, that it would be a dangerous position, that a guard kept up for the maintenance of the peace of the capital city of this part of the nation, when they are assembled together upon duty, should be allowed to plead no higher privilege than that of self-defence in the strictest sense.

And whereas my Lord Advocate seems only to

admit, that a person who has weapons put in his hands by lawful authority for the defence of the property of the Crown, or liberty of the subject, may only use these weapons when he is in imminent danger of having the execution of his trust defeated by violence; if such is the case, the execution of duty will become a very ticklish point; and it is apprehended, that few folk will be fond of it if they can possibly live without it; and of consequence, such doctrine must very much discourage any persons from offering their service either to the Crown or commonwealth.

And as the supreme executive power is by the constitution vested in his Sacred Majesty, our Sovereign, therefore, my Lord Advocate, who, by his office, is of counsel for his Majesty in all causes, will, no doubt, have due consideration, how far an argument is to be pressed against the pannel, which, by plain consequence, must tend to weaken, if not defeat, the execution of the laws.

One would rather be inclined to think, that, where a person has the trust of the execution of the laws committed to him, the smallest resistance to this trustee, as such, is a guilty aggression, and that every opposition of such aggression is lawful defence, because no man must be above the laws; and the life of the laws, in which the common good is employed, is of greater value than the lives of any one or number of the individuals, and so ought to be defended at all perils.

His Majesty's Advocate, upon this head, in his

information against the pannel, does assume this fact, that the mob, or multitude assembled at the execution, were behaving themselves peaceably, and from this seems to draw his inferences against the pannel, which, indeed, will run high enough. The pannel very well knows, that no order whatever will justify the person executing that order, if such order appears evidently to be unlawful; and yet in cases which appear doubtful, an order from a superior will have its own weight, more especially in military matters, or such other things as resemble them.

But, with submission, this reasoning upon the mob's being supposed quite peaceable and innocent is entirely out of the case. For, as we are now upon relevancy, the facts must be supposed, and then the argument considered in that view; and as the pannel does aver, that he and his guard, while in the execution of their duty, did meet with strong resistance from the mob, in so much that many of the men were greatly hurt and bruised. And if that was the case, it was an unlawful invasion of persons, to whom the execution of the laws were committed, and so might be by them in support of those laws resented to a pretty great length; except it shall be maintained, that, in the situation of the pannel and his men were posted, they could plead no higher privilege than that of self-defence, which, with great respect, cannot be maintained, but rather seems to be a contradiction, because hey had not only their own defence to take care

of, but also the defence of the peace and quiet of this city, and of the execution of the laws, and that due obedience was given to them.

In a word, upon this head, the pannel's argument is not only supported from the nature of the thing, because a man who fights with the laws upon his side, fights with great advantage against those who are fighting against the laws; and, for that reason, if a man were to fight a duel, the laws would be the best second; but also, it is believed, that no instance can be given in this country, or in any other of civilized policy and government, where a person, proceeding to what extremities whatever against persons who had assailed him, while in the due execution of the law, ever suffered the pains libelled.

My Lord Advocate seems to insinuate, as if the reading of the riot act had been a duty incumbent upon the pannel, whereby the innocent part of the multitude would have had time to have taken care of their own safety; but then his Lordship will be pleased to consider, that no person is by law authorized to proclaim that act, other than a justice of peace, sheriff, mayor, bailiff, or other head officer; and no person, under any of these characters, was left with the unfortunate pannel; but he was abandoned and left to grapple with occurrences in the best manner his own discretion could suggest to him.

But then the reading of that act could not answer the present exigency; for, though the read-

ing of that law may perhaps sometimes answer the end for which it was intended, namely, the preventing the demolition of any house or meeting-house; but if the pannel, in the present case, shall be supposed bound to have kept his hands across for the space of one hour after the reading of this act, then it is certain that the mob might have prevented the execution of the law in far less space. And it is certain, that, by the act, the mob is not put in contempt, or exposed to the penalties of it, until once they continue together one hour after the reading thereof.

His Majesty's Advocate is also pleased to hint, as if the offering of this plea in behalf of the pannel, founded upon the resistance of the mob, was in some sort inconsistent with another to be hereafter mentioned for him, viz. his innocence of the facts. But, no doubt, my Lord very well knows, that, by the laws of Scotland, there is no inconsistency in such different pleas. And this leads to the consideration of the exculpation offered for the pannel, arising from his innocence of the guilt, either of the action, command, or order, charged against him in the indictment.

And, in the first place, as to such part of the indictment as charges him with either having fired himself, or having given orders to fire, whereby Charles Husband was killed. Though it is indeed true, that it is impossible, from the nature of the thing, for the pannel to prove an absolute negative: because, as his Majesty's Advocate very just-

ly argues, if the charge in the libel is proven, to wit, that the pannel either did fire, or gave orders to fire, at this time himself, no negative evidence can prevail against it; yet as to this point, the pannel offers to prove, what the lawyers call a circumstantiate negative, which in a good measure resolves into an affirmative, viz. that at this time, when Charles Husband fell, and got the wounds charged in the indictment, whereof it is supposed he died, the pannel, as has been above recited, was in the following situation; that is to say, he was pointing his piece with his face towards the West Port, threatening the mob, that if they would not keep off he would fire; and that immediately, upon this expression, a private centinel of the guard came up from behind him, and discharged his piece, by which it will be proven Charles Husband received his death wounds; because it shall be proven, by persons of undoubted veracity, that were hard by the pannel all the time, that they not only observed that he did not fire his own piece, and gave no order for firing, joined with this other circumstance, that no proof will appear, during the whole scuffle, that ever the pannel made use of any fire-lock but his own; and that his piece, when returned to the guard, was found loaded, and in such condition, that it was even confessed by the magistrates themselves, and many others, not to have been fired; with this further addition, to exclude that further part of the charge in the indictment, of the pannel's having made use, at any time,

of any other piece than his own, viz. that he carried his own piece in his hand the whole time, except during the space of prayer above mentioned, when he gave it to his serjeant. And it shall also be proved, that there was but one shot fired at this time, at which Charles Husband is supposed to have received his death wounds. And as to the other dropping shots that are charged in the indictment to have followed upon this first shot, if, from the evidence adduced, the pannel's proof shall appear to be most pregnant, that he gave no orders to fire at this time, then he is not chargeable with the consequence of such firings.

And this further circumstance must strongly operate in favours of the pannel, to wit, that, at the time of this supposed orders to fire, the men were not drawn up in a regular line or band, but were either straggling, mixed with the mob, or in a circular form, surrounding the scaffold in the Grassmarket, which excludes all possibility of any supposed general order to fire; unless it be supposed that the pannel was a madman, seeing any compliance with such order must have led the men to fire each in his opposite neighbour's breast, and a great many into that of the pannel.

It is not altogether impossible that the pannel's expression of the word fire might have erroneously induced this fellow that came from behind his back (who of himself perhaps was too forward to embrace such order, had it been given) to discharge his piece: and if the person firing was guilty of an

error, or of a misconstruction of duty, the pannel is not chargeable therewith; seeing that every person that has the least knowledge of the exercise of arms must know, that he is not to receive an order to fire from implication, but from some known certain rule of discipline.

And for this reason it is, that the pannel takes it to be a very wise part of the military institution, to avoid misconstructions, That no man receives orders to fire (especially when he is resting or shouldering his arms) but upon a precedent series of exercise, attended with some solemnity, to avoid mistakes; greater or less, indeed, according to the nature of the occasion.

Sometimes, indeed, as was observed in the debate on the side of his Majesty's Advocate, persons will, very justly, fire upon so short advertisement as the tuck of a drum; but it is believed that it is never practised but during the noise or tumult of battle; when it is supposed that the voice of verbal order cannot reach the men; and then this tuck of the drum, or any other signal of firing, must be previously advertised to be the signal of such action.

Another thing falls also to be noticed here, touching this first charge in the indictment, and which may even be taken through the whole; that, when two or more persons are nigh together, levelling their pieces at the same time, it is not easy for the sharpest eye, especially if at any distance, to determine from what piece the fire proceeded; and of

this point military men, best acquainted with the exercise of fire-arms, can give the best account.

And lastly, upon this head, the best conjecture the pannel can make is this, that, upon this first fellow's firing, without either order or example from the pannel, his commander, the other dropping shots that ensued proceeded from other rash fellows of the guard, who, encouraged by this first example, directed and discharged their pieces against such part of the mob as they respectively supposed any injury or invasion upon them had proceeded.

The next material circumstance charged in the indictment is that touching the pannel's behaviour at the West Bow, where it is charged, That he commanded the men to face about and fire upon the people; and that, at or about the same time, he fired a musket or firelock that was in his own hand; having either reloaded, or caused to be reloaded, his own piece, or taken another out of the hand of one of the guard; and that, upon this second example and command of the pannel's, several others of the guard under his command did fire, whereby the persons mentioned in the indictment were killed and wounded.

As to which part of the charge, the pannel offers the following proof; and first, as to order, he shall prove, by multitudes of persons nigh him at the time, and who were narrowly observing him, (and orders are generally given with an audible voice,) they heard no such order given, nor heard no expression of the pannel, that, by the most remote

consequence, could have been interpreted an order to fire; and here the pannel's memory, upon the most serious reflection, cannot divine what could have given occasion to any body's conjecturing that he gave an order to fire at this time. And here, also, the former observation falls to be noticed, touching the solemnity of an order for firing.

2do. As to the action of firing, charged against the pannel himself, for firing at this time, the pannel offers to prove the very centinel, at least that it was a centinel of the guard, who gave the first fire at this time, which was the shot at Robertson's Close head. And the pannel is informed, as has been above noticed, that, at the time of taking the precognition, an offer was made to the magistrates to single out the fellow, if they would suffer the guard to be drawn out, who fired that shot towards Robertson's Close-head, by which the two or three people fell. And further, the pannel offers to prove, upon this head, not only that this fellow was the first person that fired without any order from the pannel, circumstantiated, as is above noticed, but also by many persons of undoubted credit, that they could not observe the pannel fire, or discharge any piece himself, during the whole time that this firing is supposed to have continued. And here the pannel could evidently cast up many inconsistencies to your Lordships, that must necessarily be implied, and many presumptions that strongly exclude any supposed order or example of the pannel at this

time; but does not think it altogether so prudent to mention them at present.

As to the taking a piece out of another man's hand, and firing of it, such action was a remarkable occurrence, and must have fallen out under observation; and so the pannel can say nothing about it, but leave it to evidence, with this only observation, that, as it was a notable event, it will operate almost as strong in the negative as in the positive. And it must be left to the jury to balance the evidence, if a contrariety shall appear; and to lean to that side attended with the greatest credibility, taking the known rule of the law into the compass, namely, favour to the pannel in case of dubiety. Only this observation falls to be made to your Lordships, that the circumstances of the case call aloud for the pannel's being allowed a proof upon this part of the indictment.

The pannel does agree with his Majesty's Advocate, that no negative evidence can take away a positive proof; but the pannel humbly thinks he has offered a pretty circumstantiate one; and, as my Lord Advocate seems to admit the necessity of a proof on both sides, so the pannel will not labour that point with your Lordships, not doubting but you will allow him, in general, to prove what he can to exculpate him from the guilt laid in the indictment, and that your Lordships, by your interlocutor, will allow him as much scope in that particular as any precedent of your Lordships' Court can authorize. And there are several instances, and one

very particular one, wherein great latitude was allowed, both as to the circumstances precedent, concomitant, and even subsequent to the acts charged in the indictment.

Some general useful reflections might be made, but this paper is already drawn out into too great length, and as the pannel has learned Judges, and a discerning and candid jury, the less needs be said; because it is supposed they will naturally occur to those interested in the trial; and no doubt such will lay aside all prejudices and prepossessions, and will never once think of, but utterly despise, the consequences of popular rage, or vulgar clamour.

If the pannel is guilty of the charge in the precise way and manner it is laid against him in the indictment, he is of opinion himself he deserves to suffer; but if, upon the other hand, it shall come out that he is entirely innocent of the blood of those men wherewith he is charged, he thinks his case deserves singular commiseration; because, if bonds and imprisonment, loss of employment and bread, obloquy, and reproach of blood-guilt and massacre; and, of consequence, loss of character, be calamities in human life, then he has had as great a share of them as ever attended innocence. *Sic subscribitur*,

JA. GRAHAM, Jun.

CURIA JUSTICIARIÆ, S. D. N. Regis, tenta in prætoria burgi de Edinburgo, decimo sexto die

mensis Julii, Millesimo septingentesimo trigesimo sexto, per honorabiles viros, ANDREAM FLETCHER de Milton, Justiciarium Clericum, Dominum JACOBUM MACKENZIE de Roystoun, Magistrum DAVIDEM ERSKINE de Dun, Dominos GUALTERUM PRINGLE de Newhall, et GILBERTUM ELLIOT de Minto, Commissionarios Justiciarii dictos S. D. N. Regis.

Curia legitimè affirmata.

Intran.

JOHN PORTEOUS, lately one of the Captain-Lieutenants of the City-Guard of Edinburgh, pannel,

INDICTED and ACCUSED as in the former sederunts.

The Lords Justice-Clerk, and Lords Commissioners of Justiciary, having considered the indictment pursued at the instance of Duncan Forbes, Esq. his Majesty's Advocate, against John Porteous, pannel, with the foregoing debate thereupon, find, that the pannel having at any of the times and places libelled fired a gun among the people assembled at the execution libelled, or having given orders to the soldiers under his command to fire; and thereupon, they, the soldiers, or any of them, having accordingly fired; and upon the firing, either by himself or them, the persons mentioned in the indictment, or any of them, were killed or wounded, or the pannel's being art and part of any of the foresaid crimes; all *separatim* relevant to infer the

pains of law; but allowed the pannel to adduce what evidence he could with respect to his behaviour, at the time of the foresaid crimes are libelled to have been committed, for taking off the circumstances which should be brought for inferring his being guilty, or art and part of the crimes libelled; and remitted the pannel and the indictment, as found relevant, to the knowledge of an assize. *Sic subscribitur*,

AND. FLETCHER, I. P. D.

The Lords Justice-Clerk and Lords Commissioners of Justiciary continued the above diet, at the instance of his Majesty's Advocate against Captain John Porteous, till Monday next, at seven of the clock in the morning; and ordain assizers and witnesses then to attend, under the pain of law, and the pannel to be carried back to prison.

CURIA JUSTICIARIÆ S. D. N. Regis, tenta in Nova Sessionis Domo burgi de Edinburgh, decimo nono die mensis Julii, Millesimo septingentesimo trigesimo sexto, per honorabiles viros, ANDREAM FLETCHER de Milton, Justiciarium Clericum, Dominum JACOBUM MACKENZIE de Roystoun, Magistrum DAVIDEM ERSKINE de Dun, et Dominum GILBERTUM ELLIOT de Minto, Commissionarios Justiciariæ dict. S. D. N. Regis.

Curia legitimè affirmata.

Intran.

JOHN PORTEOUS, lately one of the Captain-lieutenants of the city guard of Edinburgh, pannel.

INDICTED and ACCUSED as in the former sederunts. Thereafter the Lords proceeded to make choice of the following persons to pass on the Assize of the said John Porteous.

Assize.

Sir John Inglis of Cramond.
Alexander Gibson of Pentland.
George Halyburton of Fordell.
James Baird of Chesterhall.
John Hogg of Cambo.
Thomas Dundas of Lethem.
Alexander Brand of Brandsfield.
John Jollie, vintner in Edinburgh.
James Hunter, wright there.
William Wight, baxter there.
John Bell, brewer there.
James Davidson, bookseller there.
David Inglis, merchant there.
Alexander Sharp, merchant there.
Patrick Manderstoun, merchant there.

The above Assize being all lawfully sworn, and no objection of the law in the contrary;

THE Pannel, JOHN PORTEOUS, judicially confessed, That, time and place libelled, the several

persons mentioned in the indictment to have been killed and wounded, viz. Archibald Ballantyne, son to John Ballantyne, younger, dyster in Dalkeith; Margaret Arthur, *alias* Airth, residenter in the Canongate, near the Watergate thereof; John Anderson, son to George Anderson in Craighead, drover; Jean Peat, servant to James M'Dowal, merchant in Edinburgh; David Wallace, journeyman wright in Edinburgh; James Philp, late servant to Lauder, Esq., residenter in the Canongate; David Kidd, tailor in Edinburgh; Patrick Spaldan, apprentice to David Mitchell, jeweller in Edinburgh; James Lyle and Alexander Wallace, both servants to James Wright, staymaker in Edinburgh; John Miller, tailor in Edinburgh; David Ogilvie, writer in Edinburgh; and James Nevin, late servant to William Sellars, writer in Edinburgh, now residenter in the Potterrow; Alexander M'Neil, son to Edward M'Neil, indweller in Mertounhall; Margaret Gordon, servant to William Ogilvie, tailor in Saint Mary Wynd in Edinburgh; and Henry Grahame, tailor in Canongate; and Charles Husband, servant to Paul Husband, confectioner in the Abbey of Holyroodhouse; were so killed or wounded by firing proceeding from the party of the city guard, then under his command, as mentioned in the indictment *Sic subscribitur*,

JOHN PORTEOUS.

AND. FLETCHER, I. P. D.

His MAJESTY'S ADVOCATE, for proving his Libel, adduced the Witnesses after deponing, viz.

JAMES DRUMMOND, merchant and resi-denter in Edinburgh, aged thirty years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, time and place libelled, and after Andrew Wilson had hung some time upon the gallows, about a quarter of an hour, as the deponent thinks, he saw the execution-er going up the ladder, as the deponent apprehended, to cut him down; upon which he saw some small stones thrown by the mob at the executioner; some whereof the deponent believes might have fallen upon the guard: Upon which he saw the pannel advance from the guard westward, resting his fire-lock upon his thigh, as if he had been bending it, and thereafter saw him raise it to his breast, moving it from one point to another; and soon thereafter, the de-ponent heard a shot from the place where the pan-nel was standing, but did not observe whether the shot came from Captain Porteous's firelock; and, much about the same time, observed one of the sol-diers go out of his rank westward, and upon the north side, and saw him go farther west than the place where Captain Porteous was; the side of the window where the deponent was standing, in Ro-bertson's house, covered the said soldier from the view of the deponent by the time the first shot was fired; and which soldier had a gun and a screwed bayonet in his hand, levelled with the butt end of it at

his breast; and the deponent did apprehend at the time that Captain Porteous had fired, because he saw him in a firing posture, and immediately heard a shot, and saw a man in a few minutes thereafter, as soon as the mob dispersed, lying upon the street, upon a line whither the deponent saw Captain Porteous's piece directed; and that the above mentioned soldier came from the body of the guard which was behind Captain Porteous. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur,*

J. DRUMMOND.
ANDREW FLETCHER.

Sir WILLIAM FORBES, advocate, aged thirty years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, time and place libelled, and after the deceased Andrew Wilson had hung about twenty or twenty-five minutes upon the gallows, the deponent, from a window in Orr the stabler's house, opposite, but a little to the westward of the gallows, saw the executioner go up some steps of the ladder, as the deponent believes, to cut down the said deceased, and saw thereupon stones thrown at the executioner; upon which the executioner immediately retired to the guard, and the mob continued throwing of stones, so that the deponent does believe some of the stones might have touched the guard; and, about this time, the guard were drawing together to the north and west of the gallows, where

the captain was standing; and did soon thereafter see the pannel, advancing westward, fire his gun among the people assembled at the execution, and observed the fire and smoke issuing out at the muzzle of his piece, to the best of the deponent's observation, which he thought at the time very distinct, and that the said shot was the first which the deponent heard; and the deponent at the time did imagine, that the pannel had fired his shot high, but whether that proceeded from the situation his firelock was in, or from the appearance that the fire and smoke made that issued out of his piece, the deponent cannot now particularly charge his memory: That thereafter the deponent heard several dropping shots, about twenty, but cannot be positive as to the number: That, when the foresaid facts happened, the deponent was upon the south side of the street, and the pannel to the north of the middle of the street, almost opposite to the window where the deponent was; and when the pannel so fired, the deponent did not observe any soldier so far advanced westward from the body of the guard as the pannel was. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur,*

WILLIAM FORBES.
ANDREW FLETCHER.

Mr WILLIAM FRASER, son to the Lord Saltoun, aged twenty-four years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That

he was in a window in one Orr's house in the Grass-market, the south side of the street, that day that Andrew Wilson was executed: That, after Wilson had hung some time on the gallows, he saw the executioner go up some steps of the ladder, as he apprehended, to cut him down, and then saw the mob throw stones and dirt at him; upon which the hangman came down, and went in among the soldiers that were standing at the foot of the scaffold: That soon after the hangman had come down, he saw the pannel present and level his gun, moving the muzzle to and fro, and then saw him fire, and to the best of his knowledge and apprehension, saw the smoke issue out of the mouth of the piece; that immediately thereafter, within a second or two, he heard several dropping shots fired by the soldiers, who were there on their arms: That he thinks the dropping shots he then heard came from near the place where the pannel was standing. And deponed, That at the time foresaid the pannel fired his gun, he did not observe any of the soldiers advance before him and present their guns. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur,*

WILL. FRASER.
JA. MACKENZIE.

Mr WILLIAM URQUHART of Meldrum, aged thirty-eight years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That he was present at Andrew Wil-

son's execution the time libelled, in the house of one Orr, on the south side of the street, in company with Sir William Forbes and Mr Fraser, the preceding witnesses: That after Wilson had hung some time, he saw the executioner go up some steps of the ladder, in order to cut him down, as he apprehended, and saw the mob throw several stones at him; upon which he came down; therefore the mob continued to throw stones, some of which fell amongst the guard, whereupon he heard several dropping shots fired by the soldiers: That he saw the pannel present his piece, immediately heard a shot, which he apprehended was shot by the pannel, but did not observe it so narrowly as to see the smoke or fire issue out of his piece. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur,*

WILLIAM URQUHART.
JA. MACKENZIE.

JAMES DEWAR of Vogrie, aged sixty-four years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, time and place libelled, at Andrew Wilson's execution, he was in a window in his own house at the foot of the West Bow, in the east side of the way: That he saw the hangman go up some steps of the ladder, after Wilson had hung some time, and saw the mob throw some stones, one of which hurt the executioner on the face; upon which he came down the ladder; whereupon

he saw the pannel present his piece, and fire, which was the first shot he heard or saw; That when he saw the pannel fire, his side was to the deponent, and that the pannel was then standing on the east side of the gibbet, and that he fired his piece to the west. And deponed, he saw the fire of the powder from the pan, and heard the report of the shot. Depones, That when the pannel fired as aforesaid, he was standing on the south-east side of the scaffold. Deponed, That Wilson was cut down, not by the hangman, but by some that were standing at the foot of the gallows, and that Wilson was cut down before he heard any shots. Deponed, That he stood at his own window before Wilson was thrown over, and continued looking at the place of execution till he was cut down, and heard the shots as before mentioned. And being interrogated, what kind of clothes Captain Porteous had then on? declares, He cannot be positive, but believes they were red clothes; but is positive that he knew Captain Porteous's face when he saw him fire. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur,*

JAMES DEWAR.
JA. MACKENZIE.

GEORGE DRUMMOND, Esq. one of the Commissioners of the Customs, aged years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, at the time and place libelled, the de-

ponent was in the house of Bailie Halyburton, on the right hand, on the north side of the corner of the Strait Bow, the third story, at the time of the execution of Andrew Wilson, and from a window of said house, after the criminal was thrown over, and had hung for fifteen or sixteen minutes, the executioner was about going up the ladder; and after he went up two or three steps, he observed several stones thrown at him, which made him return; and while he was on the ground, he observed his nose blooding; and at this time he observed one or two persons, or more, standing at the foot of the gallows, one of whom stretching up his arm with a knife, he observed cut the rope; the executioner having mixed with the soldiers, he did observe the throwing of stones to continue, and some of them fell among the soldiers. Deponed, That immediately thereafter, he observed one of the soldiers advance a little before Mr Porteous to the westward, with a gun in his hand, which he presented; and immediately thereupon, the deponent heard a shot, which he imagined to be from that soldier, but did not observe fire or smoke, though at the time he concluded it was from that soldier's gun, and is positive that that was the first shot that was fired; and the deponent did not think that the stones that were thrown did give any just cause for the firing. Deponed, That about the time when he observed the soldier present his gun, as said is, he also observed the pannel holding his gun in his hand in a level, but is not sure of his putting the butt of it to his shoulder. Deponed,

That after the said first shot, within a minute he heard another, and so it continued till about the number of eighteen or twenty; and this was at the time of the firing observed by the deponent; but within some minutes thereafter, there was a second firing, which he did hear; and, upon hearing, came to the window, and observed some lime fallen from an opposite house, which he judged to have been occasioned by the bullets; and as to the eighteen or twenty dropping shots, in the first firing, were from the soldiers immediately behind the pannel, betwixt whom and them he observed no person interposed; and he observed, the time of the first shot, the pannel's face was looking westward, as was all the soldiers behind him. Deponed, That the soldiers at that time who fired were, to the deponent's best remembrance, to the northward of the scaffold; and the pannel was then, to the best of his remembrance, either upon a line to the gibbet, or a little westward of it. Further deponed, That the soldier who first fired, as said is, advanced from behind the pannel, and passed, upon his right hand, to the northward of him. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur* 1736,

G. Drummond.
Da. Erskine.

WILLIAM JOHNSTON, druggist in Edinburgh, aged forty years or thereby, married, solemnly sworn, purged of malice, partial counsel, exa-

mined and interrogated, deponed, Time and place libelled, he, the deponent, being present at the execution of Andrew Wilson, he did observe the pannel take a gun out of a soldier's hand, at which time he was standing betwixt the Cornmarket and one Tod's shop, which is under Bailie Halyburton's house; thereupon he observed the pannel advance some steps westward, and did see him present and level his gun, that is to say, hold it out and fire amongst the multitude, and did observe the smoke come out of the gun. And deponed, That this was the first shot he heard, which shot immediately followed after the criminal was cut down by a hand standing at the foot of the gibbet; and the deponent at the time was standing in a window in the house of one Gairdner, horse-farrier, by the Meuse Well; and when the pannel was taking the gun out of the soldier's hand, he appeared to be in passion, and it was some short time before he was master of the gun. Deponed, That, to the best of his remembrance, the pannel was clothed in red; but he being well acquainted with the pannel's face, he is positive that he was the person that took the gun and fired as aforesaid. And deponed, That he believes there was about thirty yards distance betwixt the window where the deponent was and the pannel at the first firing. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur,*

WM. JOHNSTON.
DA. ERSKINE.

MARK SPROT, skinner, and one of the constables of Edinburgh, aged twenty-eight years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, time and place libelled, as he stood on William Orr stabler's window, south side of the Grassmarket, he saw Wilson, the criminal, cut down from the gibbet; upon which occasion he did not observe that there was any greater disturbance than usual at executions: That a very little while after the criminal was so cut down, he observed the pannel advance before the soldier; and upon the north side of the scaffold, over against the gibbet, he saw him fire his piece towards the west, and the smoke issue out of the mouth of his gun: This, he says, was the first shot that was fired; but immediately on the back of that, a tall man with his own hair, about the third behind the pannel, as he thinks, fired off his piece likewise towards the west, but up in the air over the heads of the multitude: That very soon after, several other dropping shots followed, after which, when the people fell back and opened, he observed a young man lying on the ground as dead, directly opposite to the place where the pannel fired. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur,*

MARK SPROT.
GILB. ELLIOT.

GEORGE CAMPBELL, wright in Edinburgh, aged twenty-eight years or thereby, married, solemn-

ly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, time and place libelled, the deponent stood in the window of Mr Carmichael's house, in the south side of the Grassmarket, directly opposite to the gibbet: That a very little after Wilson was cut down, he observed the pannel, with four or five of his men about him; and that, as he pointed his piece to and fro towards the multitude, he observed him receive a stroke by a stone thrown from behind the scaffold, off which it rebounded, and struck him; upon which he immediately fired his piece; but whether this was the first shot or not, the deponent cannot tell, for there were three or four fired much about the same time; but that the pannel fired he is sure, for he saw fire and smoke issue from his piece: That upon these shots already mentioned, he saw a man fall down upon his back on the street: That after this, he saw the pannel raise his musket, and put his hand to his cartridge box, as if he intended to load again; but does not know what followed upon this, because he immediately lost sight of him. Deponed, That when the pannel fired his piece as above, he was standing towards the south-east corner of the scaffold, and pointed his piece towards the south west: That the pannel's fire, with the shots that went off at the same time, were the first that were made on that occasion. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur,*

GEO. CAMPBELL.

GILB. ELLIOT.

JAMES BALD, merchant in Edinburgh, aged thirty-two years, or thereby, widower, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, time and place libelled, the deponent stood in the same window with the immediate preceding witness, or at least in a window in the same room: That a little after Wilson was cut down from the gibbet, he saw the pannel advance a little westward from the Cornmarket, towards the south side of the gibbet, and fire off his piece westward, toward the Meuse-well: That at this time he saw none of the soldiers near him, nor observed any other fire but his; and before there was any more firing, when the multitude fell back, he saw a man lying dead, towards the place that the pannel pointed his piece: That he is sure the Captain fired, since he saw the fire and smoke issue from his piece. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur,*

JAMES BALD.
GILB. ELLIOT.

ANDREW DAW, servant to James Montgomery, brewer in Potterrow, aged twenty-two years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, time and place libelled, the deponent was standing at the foot of Robertson the stabler's close, when Wilson was cut down from the gibbet; immediately after which, the pannel, who

was standing in the middle of the street, between the deponent and the Cornmarket, fired his piece toward the place where the deponent was standing, upon which a baxter in the Abbey, called Charles Husband, dropt just by the deponent; and his the deponent's coat was torn in the shoulder with the same shot: That he heard the report of the Captain's piece, though he neither saw the fire nor the smoke, yet he is sure the pannel fired, because he saw no other piece presented at the same time: That the pannel, when he fired as above, was as near to the deponent as the end of the table, where he now stands, is to the west end of this room. Deponed, That the shot mentioned to be made by the pannel was the first he heard that day. Deponed, That during the whole time of the execution he never came nearer the scaffold than Robertson's close-foot, (by Robertson's close-foot is meant the end nearest the Grassmarket.) *Causa scientiæ patet.* And this is the truth, as he should answer to God. And declared he cannot write. *Sic subscribitur,*

GILB. ELLIOT.

WALTER SHEARGOLD, indweller in Edinburgh, aged twenty-eight years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That he was present the time and place libelled; and after the criminal Wilson was cut down, he saw Captain Porteous fire his gun, holding the same straight out at the multitude; and that the deponent was then

within three yards of the Captain, when he saw him fire, and that after he had fired, he heard him call fire; then heard some shots, but does not know from what hands they came, for he immediately retired to the Lawnmarket. Deponed, That when the pannel fired, his left hand was towards the scaffold, and he fired towards the Westport. Deponed, That the scaffold was nearer to the Westport than the pannel was when he fired, that is, the pannel was nearer to the Cornmarket. Deponed, That this shot by the pannel was the first that he heard at that time, and that he was present all the time of the execution: That he was so near as to see the fire and the colfin fly out of the pannel's gun. *Causa scientiæ patet*. And this is the truth, as he should answer to God. *Sic subscribitur*,

WALTER SHEARGOLD.
WA. PRINGLE.

JOHN RITCHIE, servant to Mr Archibald Murray, advocate, aged seventeen years, or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, the time and place libelled, the deponent was present at the execution of Andrew Wilson; and after the criminal was cut down, he saw and heard about three shots fired, and then he heard a fourth shot, which was by Captain Porteous, and that he saw a man fall down, but the deponent imagined it was from the pressure of the crowd: That there was very short time betwixt the shots, but that which

was by Captain Porteous was the last in order: That after the crimmal was cut down, the guard drew towards the north side of the scaffold: That the deponent was standing within two or three yards of the foot of Robertson's Close, when he saw and heard the firing. Deponed, He heard the pannel mention the word fire, before the firing. Deponed, That the pannel was, to the best of the deponent's remembrance, standing as far west as the gallows; but he cannot be very positive, the mob and crowd was such, that he could not very distinctly discern. Deponed, That the shots mentioned by the deponent, first three, and then a fourth, was the first he heard that time. *Causa scientiæ patet.* And this is the truth, as he should answer to God. *Sic subscribitur,*

JOHN RITCHIE.
WA. PRINGLE.

THOMAS CROOKSHANKS, servant to Thomas Trotter, brewer in Edinburgh, aged twenty-two years, or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, the time and place libelled, the deponent being upon the causeway on the south side of the scaffold, saw the pannel, who was then standing upon the north side of the scaffold, fire the gun that was in his hand upon the multitude; the point of the piece being directed westward, and saw the fire and smoke issue out of the muzzle of the gun that was in the pannel's hand. And further,

deponed, That the pannel was standing at the north side of the scaffold, and at that end of it which is next the Bow. *Causa scientiæ patet.* And this is the truth, as he should answer to God. *Sic subscribitur*, THOMAS CROOKSHANKS. And being further interrogate, If the said shot that the pannel fired was the first shot? deponed, That it was the first shot, but that several other shots followed immediately thereafter. And this is likewise the truth, as he shall answer to God. *Sic subscribitur*,

THOMAS CROOKSHANKS.
ANDR. FLETCHER.

JAMES NEILSON, gardener in the Bull Close of Edinburgh, aged thirty-one years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, Time and place libelled, the deponent being standing within the foot of a turnpike near the Meuse-well, saw the pannel, who was then standing upon the north side of the scaffold, a little to the eastward, where the gallows was; and saw the pannel advance, westward, towards the multitude, with his firelock in his hand, moving it to and again, as if he had been beating back the people; and at the third or fourth motion, saw the pannel fire the piece that was in his hand upon the multitude, pointing it westward, and saw the smoke issue out at the muzzle of the said piece: That this was the first shot which the deponent heard, which was soon followed by others for the deponent observed the pannel, after he had

fired his piece, retire some yards to the soldiers, and saw five or six of these soldiers advance and fire upon the multitude, and soon thereafter, when the multitude were beat off, the deponent saw a boy with black hair lying within ten yards of the turnpike where the deponent was standing, and saw four other persons lying at different places upon the street; and saw the first mentioned boy bleeding at the ear. *Causa scientiæ patet.* And this is the truth, as he should answer to God. *Sic subscribitur,*

JAMES NEILSON.
ANDR. FLETCHER.

WILLIAM GORDON, baxter, and servant in the common bakehouse in Hastie's Close in Edinburgh, aged twenty-one years, or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, the time and place libelled, the deponent being at the head of the turnpike at the back of the Meuse-well, did from thence see Captain Porteous, pannel, who was then upon the north-west corner of the gibbet, wave his firelock to and again; and thereafter saw the said firelock while in his hand go off, and saw the fire and smoke go out at the muzzle of it; and this was the first shot which the deponent heard that day, but heard several shots thereafter; and that the shot which the pannel fired was soon after the deceased Andrew Wilson was cut down. *Causa scientiæ patet.* And

this is the truth, as he should answer to God. *Sic subscribitur,*

WILLIAM GORDON.
ANDR. FLETCHER.

JAMES NASMITH, servant to Colin Alison, wright in Edinburgh, aged twenty-six years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, time and place libelled, and soon after the deceased Andrew Wilson was cut down from the gibbet, the deponent being upon the causeway of the north-east end of the scaffold, beginning to take down the scaffold; and did then hear the pannel, who was towards the north end of the scaffold, say several times to the soldiers under his command, Fire, and be damned! and at the same time saw the pannel advancing westward, with his piece presented in his hand; and immediately after hearing the foresaid words, he heard several shots go off; and when the foresaid words were spoken by the pannel, he was passing by the deponent westward about a yard or two distant from him. *Causa scientiæ patet.* And this is the truth, as he should answer to God. *Sic subscribitur,*

JAMES NASMITH.
ANDR. FLETCHER.

DAVID BROWN, servant to Colin Alison, wright in Edinburgh, aged twenty-eight years, or thereby, unmarried, solemnly sworn, purged of ma-

lice, partial counsel, examined and interrogated, deponed, That, time and place libelled, and after the deceased Andrew Wilson was cut down from the gibbet, the deponent being standing at the east end of the scaffold, assisting to pull it down; and then saw the pannel, going along the north side of the scaffold westward, and heard him give orders to the soldiers under his command to fire, but does not remember the particular expression; and immediately upon the orders being given as aforesaid, he heard several shots; and when the deponent heard the pannel give the foresaid orders, he was about the distance of the breadth of the scaffold from him. *Causa scientiæ patet.* And this is the truth, as he should answer to God. *Sic subscribitur,*

DAVID BROWN.
ANDR. FLETCHER.

MATTHEW KIDD, servant to Thomas Miln, deacon of the masons in Edinburgh, aged thirty-three years, or thereby, married, solemnly sworn, purged of malice, and partial counsel, examined and interrogated, deponed, Time and place libelled, and soon after the deceased Andrew Wilson was cut down from the gibbet, the deponent being standing upon the plainstones near Captain Todd's shop, he saw the pannel going from the well at the Bow-foot westward, and saw him fire the gun that was in his hand, and thereafter give orders to the soldiers under his command to fire; thereafter heard him call to the said soldiers to level their pieces, and

saw the said soldiers fire; and that the shot fired by the pannel as aforesaid, was either the first or second shot, which shot he fired standing to the north-east of the scaffold, half way betwixt that and the Bow-foot well; and that when the pannel ordered the soldiers to level their pieces, he was some yards nearer the foot of the Bow. *Causa scientiæ patet.* And this is the truth, as he should answer to God. *Sic subscribitur,*

MATTHEW KIDD.
ANDR. FLETCHER.

JAMES MAXWELL, servant to Colin Alison, wright in Edinburgh, aged thirty-two years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, the time and place libelled, after Wilson was cut down and put in his coffin, there were some stones thrown by the mob amongst the guard; upon which he heard the pannel order the soldiers to turn in; and immediately heard him give the soldiers orders to fire, and be damned; and then saw him advance two or three paces, and saw his gun cocked, and his thumb upon the dog-head, and saw him fire the gun; and immediately before he heard any other shot, he saw a boy fall near a coppersmith's shop, to the north-west of the place from which the pannel fired his gun. There were six or seven more shot after the orders were given; and then he saw three men and a woman fall, one of which had a wound in his forehead, and

another in the side of his head: That after the soldiers fired as aforesaid, he heard the pannel say to one of the soldiers, that, if he did not fire, he would take his piece from him. Deponed, That he the deponent was then standing on the south side of the scaffold, helping to pull it down; when he heard and saw what is above deponed upon; and that the pannel was upon the north side of the scaffold about ten yards from it, over against the middle of the scaffold; and deponed, That the pannel's shot at that time was the first he heard then shot. Deponed, That he was present at the time, from Wilson's coming down to his execution, till after he was cut down and carried away; during which time he heard no shot fired, until that fired by the pannel. *Causa scientiæ patet.* And this is the truth, as he should answer to God *Sic subscribitur,*

JAMES MAXWELL.
JA. MACKENZE.

WILLIAM DOUGLAS, one of the soldiers in the city-guard, Edinburgh, aged forty-seven years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, the time and place libelled, as the executioner was going up the ladder to cut down Wilson, there were several stones thrown at him, which obliged him to come down the ladder; at the same time, there were several stones thrown amongst the guard, before Wilson was cut down, at which time he heard the pannel say to the sol-

diers, be damned to you, bougars, fire; after which he heard several shots fired by the men, but knows nothing of the pannel's having fired; and that these were the first shots he heard fired that day, to the best of his knowledge. Deponed, That the pannel, when he uttered the words before mentioned, was standing at the south side of the gallows. Deponed, That the first shots were fired before Wilson was cut down, and likewise some of them thereafter. *Causa scientiæ patet.* And this is the truth, as he should answer to God; and declares he cannot write. *Sic subscribitur,*

JA. MACKENZIE.

ARCHIBALD YETTS, litster in the Abbey of Holyroodhouse, aged forty-eight years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, the time and place libelled, a little after Wilson was cut down from the gallows, he saw the pannel fire his piece among the multitude, and immediately heard him say to his men, level your pieces, and fire, and be damn'd! whereupon there were a great many shots fired by them, and saw the pannel take a gun from one of the men, which he the pannel fired. Deponed, That he the deponent was within six yards of the pannel when he fired, and spoke the words before mentioned. Deponed, That at the time when the pannel took the gun from the soldier, he laid his own upon the scaffold, and that there were some persons, but

very few, then standing upon the scaffold. Deponed, That betwixt the time that the pannel fired his own piece, and his taking the gun from the soldier, as aforesaid, it might be about eight or nine minutes. And deponed, That at the time he fired the second gun, there were several other guns fired at the same time. Depones, That there was no shot fired before the first fired by the pannel, and that the second shot fired by the pannel was near the same place where he fired the first; and that he had not moved above six or seven yards betwixt the first firing and the second; and that some of the soldiers followed the pannel in that space, and returned with him again to the place where he fired first. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur,*

ARCHIBALD YETTS.
JA. MACKENZIE.

WILLIAM MURRAY, barrowman and indweller in Edinburgh, aged twenty-seven years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, Time and place libelled, the deponent being present at the execution of Andrew Wilson, he did observe two of the soldiers, under the pannel's command, fire their guns, but their guns were fired up in the air; thereafter he observed the pannel fire his gun amongst the multitude, whereupon he observed a boy drop down, and did hear the pannel call out to the sol-

diers, damn them for bougars, why did they not fire even forward and clean the street? At which time the deponent was standing about the south pillar of the Cornmarket, about twenty yards distance from the pannel, as he apprehends. Further deponed, That after the said first firing, he observed the pannel take a gun out of a soldier's hand, and fire again, directing it towards a man he was pursuing, which he did thirty or forty yards, and upon firing, he observed the person so pursued fall down. And being interrogated, How long his present dulness of hearing remained with him? deponed, He has been as dull of hearing these seven years past. Deponed, That the two shots from the two soldiers were the first firing he heard upon that occasion. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur,*

WILLIAM MURRAY.
DA. ERSKINE.

JAMES NICOLL, watchmaker in Canongate, aged thirty-six years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That he was present, time and place libelled, at the execution of Andrew Wilson; and then he did observe the pannel fire his gun, holding it out straight before him, amongst the multitude there assembled; and as he heard the report of the gun, so he observed the smoke of the powder coming from the gun; and this shot was the first he heard upon that occasion; and the pan-

nel, when he thus fired, was standing betwixt the gibbet and one Mr Cunningham's shop, on the north side of the street, near the north-east end of the scaffold. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur,*

JAMES NICOLL.
DA. ERSKINE.

WILLIAM JAMESON, merchant in Edinburgh, aged twenty-four years, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That he was present, time and place libelled, at the execution of Andrew Wilson; and about the time when they were cutting down the criminal, the deponent then standing within three or four yards of the pannel, did hear him give orders to the soldiers that were behind him to fire, and immediately thereafter he did hear the pannel fire the gun that was in his own hand; and upon his firing, observed the smoke of the powder come from it; thereafter he observed the pannel take a gun from one of the soldiers, but what use he made thereof, he knows not; and it was very short time betwixt the pannel's firing and his taking the gun from the soldier, as also a very short distance betwixt the place where he fired, and where he took the said gun; the place of his firing, to the deponent's memory, being near to Robertson's Close head; and where he took the gun, was a very little way up the street from it; and the shot he heard from the pannel's gun was the first he heard that

day. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur.*

WILLIAM JAMESON.
DA. ERSKINE.

JOHN MOFFAT, baxter, and servant in the common bakehouse in Hastie's Close in Edinburgh, aged twenty-six years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, at the time and place libelled, the deponent was standing in Mr Orr's door, on the south side of the Grassmarket; and some short time after Wilson was cut down, he saw the pannel take a gun out of one of the soldiers' hand, before Mr Todd's shop-door, which he immediately fired off towards the north-west; a little before which, the deponent saw him fire his own gun from the same place: That upon the captain's firing, the deponent saw some of the soldiers, who stood behind the Cornmarket, fire their guns up in the air. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur,*

JOHN MOFFAT.
GILB. ELLIOT.

JOHN STEWART, merchant in Edinburgh, aged thirty years, or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, at the time and place libelled, the deponent was standing in a win-

dow of Wine Garden's house, on the south side of the scaffold. That some short time before Wilson was cut down, upon some stones being thrown at the hangman, he observed the pannel jump down from the south side of the scaffold, and walk up briskly towards the place where the disturbance was, but nothing in his hand but a cane; immediately after this, Wilson was cut down; upon which the guard that attended the execution began to march up the Bow; and that, at the north-west corner of the gallows, he observed the pannel take a gun out of a soldier's hand, with which he pushed back the multitude; and that, when the pannel came the length of the Bow-foot, being upon the rear of his men, he saw him receive a stroke with a stone, upon which he suddenly turned about, and waved his piece to and again towards the multitude, but without firing, but a very little after that, he turned about all at once, and stepped some steps forward, and fired off his piece towards the crowd westward: That this was the first shot which the deponent either heard or saw made that day. *Causa scientiæ patet.* And this is the truth, as he should answer to God *Sic subscribitur,*

JOHN STEWART.
GILB. ELLIOT.

JOHN GIBB, cowfeeder in Canongate, aged forty-four years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and in-

terrogated, deponed, That, time and place libelled, he was standing at Mr Robertson's Cl[illegible] head, in the Grassmarket: That a very little after the hangman had been on the ladder, as he thought to cut down Wilson, he observed the pannel with his gun in his hand, advance towards the crowd, where the disturbance was, and present his piece three times, the last of which times, the deponent thought he fired her off, for he saw the priming burn in the pan, but could not see the fiery smoke at the muzzle, because of the crowd; neither could he with certainty distinguish the report, because several other pieces were fired off at the same time: That upon these pieces being so fired, he saw one Mr Niel drop down at the Meuse-well: That before the firing above mentioned, he neither heard nor saw a shot made that day. *Causa scientiæ patet.* And this is the truth, as he should answer to God. *Sic subscribitur,*

JOHN GIBB.
GILB. ELLIOT.

Follow the Witnesses adduced for the Pannel.

GEORGE SMEITON, writer in Edinburgh, aged thirty years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, time and place libelled, he was present at the execution of Wilson: That when the executioner was doing his duty, he saw Captain Porteous come off the scaffold, because the mob was crowding upon the guard; and

while the pannel was endeavouring to keep off the mob, he saw a man with a silk napkin about his neck press upon the pannel, and seem to endeavour to grasp at, but that a young gentleman there, in green clothes, kept him off; and then the pannel returned to the scaffold; but about the time the criminal was cutting down, or to be cut down, the pannel went off the scaffold again; and about that time there were stones thrown by the mob at the hangman and the guard, and some of them fell amongst the guard: That, so far as the deponent could observe, being upon a bartizan, upon the south side of the scaffold, five story high, the stones seemed to be pretty large, but the deponent cannot tell the dimensions; and then he soon observed a shot, which was the first that he observed, and came from one of the soldiers; and this shot was after the criminal was cut down; and after this shot, in a very little followed three or four other shots; and at this time the pannel had his piece presented towards the multitude; and that he saw the flash of the pan of the soldier's gun that fired the first shot. Deponed, That the pannel was pretty near the soldier that fired the first gun. *Causa scientiæ patet.* And this is the truth, as he should answer to God. *Sic subscribitur,*

GEO. SMEITON.
WA. PRINGLE.

THOMAS HARTON, doctor in the regiment of Welsh Fusiliers, in the Canongate, aged thirty-

nine years, or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, Time and place libelled, he was present at the execution of Wilson, when he saw several stones thrown by the mob at the guard, of such bigness that was sufficient to have killed them, in case they had hit them in a proper place; which continued some little time. Deponed, That while the criminal was hanging upon the gallows, the deponent saw a man press towards the pannel, and being come near him, he held up his hand to him in a threatening manner; but the deponent did not hear what words he uttered. Deponed, That when the pannel was upon the scaffold, he had no gun in his hand; but when he came off again, he took a gun from a soldier. Deponed, That when the pannel came off the scaffold, he went about to the west side, and turned about towards the north, endeavouring to get his men together, which he could not well do, they being so much interspersed with the mob; and they continuing still to throw the stones, the pannel turned about with his face towards the west; and having his fusee in such a manner in his hand, as if he had not designed to fire, but waving it from side to side, rather seeming to intimidate them: and at this time there was a soldier came upon his right hand, and fired close by the pannel; and this was the first shot the deponent observed: and deponed, That he had his eyes fixed upon the pannel all this time. Deponed, He did not see the pannel fire; and he is very well assured, that he

did not fire at that time. Deponed, That this shot was immediately after the criminal was cut down. Deponed, That after this, the pannel endeavoured to carry off his men. Deponed, That the soldier that came up by the pannel's right side, came up from behind him. *Causa scientiæ patet.* And this is the truth, as he should answer to God. *Sic subscribitur,*

THO. HARTON.
WA. PRINGLE.

DAVID RANNIE, merchant in Edinburgh, aged forty years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That after the first firings were over, the deponent from his own window in the land above Bailie Dewar's, at the foot of the Bow, saw the pannel draw off his men, and marching up the Bow, halt at Bailie Crocket's shop, at which time the deponent heard some soldiers fire, which the deponent apprehended was in the rear; the deponent looking upwards, and they that fired not being under his eye. *Causa scientiæ patet.* And this is the truth, as he should answer to God. *Sic subscribitur,*

DAVID RANNIE.
ANDR. FLETCHER.

JOHN CLARK, serjeant in the regiment of Welsh Fusiliers, aged thirty-three years, or thereby, unmarried, solemnly sworn, purged of malice,

partial counsel, examined and interrogated, deponed, That, the time libelled, the deponent was sent by the captain who commanded the detachment of the King's forces in the Lawnmarket to the place of execution, to get orders from the Magistrates or the pannel; and having gone up to the scaffold, and while the deponent was conversing with the pannel, he saw a stone thrown at the executioner, which cut him in the nose so that he bled; and about the same time there was a stone about the bigness of the deponent's two fists, hit the calf of the deponent's leg; upon which the deponent with the pannel came down from the scaffold, and thereafter saw the pannel moving his fusee in order to keep off the crowd, who had by that time pressed upon the guard, and drove them about four or five yards from the place where they were posted at first; and thereafter the deponent saw Captain Porteous endeavouring to keep off the mob with his fusee, waving it to and again, telling them to keep off, or he would fire, but that there was no fire at that time; and the deponent then walking towards the West Bow, saw four or five of the soldiers presenting their pieces, and saw one of them advance to the right where the deponent was standing, and fire upon the crowd; which was the first shot the deponent heard; at which time the deponent saw the pannel upon his left hand, about seven yards from him; and then the deponent saw two other of the soldiers come up betwixt the pannel and the deponent, and fire in the air; and thereafter heard four or five more shots, which the deponent thinks were fired betwixt the

place where the deponent was standing and the pannel; and the deponent during that time had his eye fixed upon those who fired, and did not observe Captain Porteous fire or give orders to fire; and upon the first shot as aforesaid, the deponent observed a man drop at the entry of Robertson's Close. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur,*

JOHN CLARK.
ANDR. FLETCHER.

COLIN CAMPBELL of Ardonnick, aged forty-four years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, at the time and place libelled, the deponent, in a window from Mrs Carmichael's, opposite to the scaffold, observed no disturbance, till once the executioner was going up the ladder to cut down the deceased Wilson; and then saw some stones thrown at the executioner, upon which he retired; and as he was passing the Corn-market, the deponent observed one of the stones hit him, and saw some stones thrown at the guard who were upon the north side of the scaffold; and saw the pannel making motion with his fusee to keep off the mob; and afterwards turned towards the foot of the Bow very civilly; and then saw a stone hit one of the soldiers; and which soldier the deponent saw present his firelock; and saw another stone hit the same soldier; and thereupon the said soldier pointed his firelock westward, and fired im-

mediately; and another soldier fired immediately after him, which firings took the deponent's eyes from off the pannel; and which two firings the deponent thinks were the first that were fired by the said two soldiers who had advanced among the crowd from their party. *Causa scientiæ patet.* And this is the truth, as he should answer to God. *Sic subscribitur,*

COLIN CAMPBELL.
ANDR. FLETCHER.

WILLIAM MEANIE, serjeant in the City Guard of Edinburgh, aged forty-eight years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, time and place libelled, and about the time the deceased Andrew Wilson was cut down, there were showers of stones thrown at the guard, and particularly one big stone lighted betwixt the deponent and Serjeant Finlay, above three pound weight; and that the drummer was cut in the head with a stone, and the drum struck with a stone; and that Alexander Mushet, sentinel, one of the guard, had his shoulder blade broke with a stone; and that, before these strokes were given, the deponent, by order of the pannel, was drawing off, and forming his men in the foot of the Bow: That the pannel gave the deponent his fusee, which was the fusee the pannel ordinarily carried, to keep, while he attended the execution and the prayers; which the deponent returned to the pannel again, upon the signs being

given to cut down Wilson, and before the pannel came down from the scaffold. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur,*

WILLIAM MEANIE.
JA. MACKENZIE.

ALEXANDER CAMPBELL, apprentice to George Young, surgeon in Edinburgh, aged eighteen years, or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, at the time and place libelled, he saw several stones thrown among the guard, after Wilson was cut down; and saw two of the soldiers of the guard step aside from among the rest and fire; and these were the two first shots that he heard. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. *Sic subscribitur,*

ALEXR. CAMPBELL.
JA. MACKENZIE.

MATTHEW HOWERT, soldier in the City Guard of Edinburgh, aged forty years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That he was present at Wilson's execution, at the time libelled; and that, before and after Wilson was cut down, there was a great many stones, both great and small, thrown among the guard by the mob:

That after the pannel came down from the scaffold, he saw him wave his piece he had in his hand, but did not offer to present it; then he saw a soldier step out from the rest, and fire his piece in the air; as likewise two or three soldiers, that fired thereafter, did likewise fire their pieces in the air; and that these who fired first were standing close by the pannel and the deponent; and these were the first shots he heard that day; and he heard, the soldiers say, one to another, Fire, or we shall all be knocked down; and upon more stones being thrown among them, several of them did fire; but, before that time, he heard the pannel say to the soldiers twice, Do not fire. After these shots were fired, the Captain marched up towards the Bow, and the men followed him: That, at the time that the shots were fired, as aforesaid, the pannel was standing at the foot of the steps of the scaffold, with his face towards the Castle. And deponed, He was one of those that followed the Captain, nor did he see the Captain fire as he was going up the Bow: That, when the Captain was marching on the head of the men up the Bow, he heard a dropping shot or two fired from the rear; nor did he see the Captain return again towards the scaffold, but marched straight on up to the town. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. And declared he cannot write. *Sic subscribitur,*

JA. MACKENZIE.

DAVID MARTINE, soldier in the City Guard

of Edinburgh, aged forty years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That he, the deponent, was one of the party of the City Guard who attended the execution of Andrew Wilson; and, before there was any firing, he did hear the pannel call to them, Not to fire; and, before that, the deponent had his shoulder-blade disjointed with a stroke he received upon it with a stone. *Causa scientiæ patet.* And this is the truth, as he shall answer to God. And declared he cannot write. *Sic subscribitur,*

DA. ERSKINE.

WILLIAM BYRES, soldier in the City Guard of Edinburgh, aged fifty-one years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That he was one of the City Guard who attended the execution of Andrew Wilson; and that he did not hear Captain Porteous give any orders to fire; but, when the firing happened, he was at some distance from the pannel; after the firing of several shots, the pannel called unto the soldiers, To fall into their ranks, and follow him; which, accordingly, the deponent and the rest did; falling in gradually, as they were able; and followed him to the guard-house, till they were dismissed; and, in their march up the Bow, did hear one shot, that came from the rear, but by whom he knows not. *Causa scientiæ*

patet. And this is the truth, as he should answer to God. *Sic subscribitur,*

WILLIAM BYRES.
DA. ERSKINE.

JAMES ARMOUR, Writer to the Signet, aged fifty years, and upwards, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That he was looking over a window to see the execution of Andrew Wilson; after the criminal was thrown over and cut down, he observed the crowd of people throwing stones of considerable bigness, but against whom they were directed he knew not; but they fell among the soldiers; upon which he heard two or three shots, but from whose hands he did not observe: Thereupon there was an intermission for two or three minutes; but thereafter, when the pannel, with his party, were retiring, which they did in great confusion and disorder, the crowd pursued after them, renewed the throwing of great stones, and in great number; upon which some of the soldiers turned about, and marched back, some eight or ten paces, still in disorder; and then heard a good number of more shots fired, which, to his grief, he saw did great execution. *Causa scientiæ patet.* And this is the truth, as he should answer to God. *Sic subscribitur,*

JAMES ARMOUR.
DA. ERSKINE.

JOHN ROBERTSON, stabler in the Grass-

market of Edinburgh, aged thirty years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, at the time libelled, as he stood in his own window, in the Grassmarket, he saw the pannel, with his piece in his hand, moving it to and again, keeping off the mob; and heard him say, Fire, or I will fire, does not know which of the two: That immediately after this, he saw a single man step out, three or four paces before Captain Porteous, and fire his piece; and the deponent verily believed, that the people who fell near his Close got their wounds by that shot; because they were lying that place towards which the man seemed to point. Deponed, That he heard some firing towards the foot of the Bow, before the last mentioned shot. *Causa scientiæ patet.* And this is the truth, as he should answer to God. *Sic subscribitur,*

JOHN ROBERTSON.
GILB. ELLIOT.

GEORGE VINT, coal-grieve to Sir William Baird of Newbyth, aged forty six years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, at the time libelled, he was in John Robertson's window, in the Grassmarket, when he observed the pannel moving his piece to and again, as if keeping off the mob; and at the same time, he saw one of the soldiers, a black haired man, step forward before the pannel, and fire his piece; upon

which the pannel turned about to him and pushed him into his rank. Deponed, That he did not see the pannel fire at that time, or any other; and that the mentioned shot was the first he heard or saw that day. *Causa scientiæ patet.* And this is the truth, as he should answer to God. *Sic subscribitur,*

GEORGE VINT.
GILB. ELLIOT.

ALEXANDER THOMSON, town-officer in Edinburgh, aged forty years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, being upon the scaffold on the 14th of April last, when Wilson was executed, the pannel sent him to the Magistrates, who were in William Orr's house, to know of them how long the criminal should yet hang upon the gallows: That he returned to the pannel with the Magistrates' direction, which was, that he should still hang a quarter of an hour; but, before the half of that time was expired, Wilson was cut down. *Causa scientiæ patet.* And this is the truth, as he should answer to God. *Sic subscribitur,*

ALEX. THOMSON.
GILB. ELLIOT.

PETER COLSTOUN, merchant in Edinburgh, aged twenty-five years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, time and

place libelled, and after the first firing, the deponent, being standing under the north-west corner of the [illegible]market, saw the pannel march the guard under his command up the West Bow; and saw several of the rear of that guard fire upon the people assembled at the execution; and, at the same time, observed, that the pannel was within the first turn of the West Bow, and so out of the deponent's view. *Causa scientiæ patet.* And this is the truth, as he should answer to God. *Sic subscribitur,*

PETER COLSTOUN.
ANDR. FLETCHER.

JOHN KENNEDY, surgeon in Edinburgh, aged fifty years, or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That, some short time after the execution of Andrew Wilson, in April last, the deponent attended the persons of the Town Guard after-mentioned, viz. Alexander Mushet, soldier, the spine of whose shoulder-bone was crushed, and Alexander Braid, soldier, who had a contusion in his right foot, both which persons informed the deponent, that they received these hurts at the execution of the said Andrew Wilson; and that the last-mentioned person is lame to this day. *Causa scientiæ patet.* The deponent was employed to wait upon the said persons. And this is truth, as he should answer to God. *Sic subscribitur,*

JO. KENNEDY.
ANDR. FLETCHER.

The Lords Justice Clerk and Commissioners of Justiciary ordained the assize to inclose instantly, in a room prepared for them in the Exchequer, and to return their verdict in the Old Court-House to morrow, at four o'clock at night; and the whole fifteen to be then present, each person under the pain of law, and the pannel to be carried back to prison.

CURIA JUSTICIARIÆ, S. D. N. Regis, tenta in prætorio burgi de Edinburgo, vigesimo die mensis Julii, millesimo septingentesimo trigesimo sexto, per honorabiles viros, ANDREAM FLETCHER de Milton, Justiciarium Clericum, Dominum JACOBUM MACKENZIE de Roystoun, Magistrum DAVIDEM ERSKINE de Dun, Dominos GUALTERUM PRINGLE de Newhall, et GILBERTUM ELLIOT de Minto, Commissionarios Justiciarii, dict. S. D. N. Regis.

Curia legitimè affirmata.

Intran.

JOHN PORTEOUS, lately one of the Captain-Lieutenants of the City-Guard, pannel,

INDICTED and ACCUSED as in the former sederunts.

The persons who past upon the assize of the said John Porteous returned their verdict in presence of the said Lords, whereof the tenor follows:

Edinburgh, July 20, 1736.

The above assize having inclosed, did choice Sir John Inglis of Cramond to be their Chancellor, and James Davidson, bookseller in Edinburgh, to be their Clerk; and having considered the indictment at the instance of Duncan Forbes of Culloden, Esq. his Majesty's Advocate for his Highness's interest, against John Porteous, late one of the Captain-Lieutenants of the City-Guard of Edinburgh, pannel, with the Lord Justice-Clerk and Lords Commissioners of Justiciary their interlocutor thereupon, and depositions of the witnesses adduced for proving thereof, the pannel's own judicial confession, and depositions of the witnesses adduced for the said John Porteous, pannel, his exculpation, they all in one voice found it proven, that the said John Porteous, pannel, fired a gun among the people assembled at the place of execution, and time libelled; as also, that he gave orders to the soldiers under his command to fire; and upon his and their so firing, the persons mentioned in the indictment were killed and wounded; and found it proven, that the pannel and his guard were attacked and beat by several stones of a considerable bigness, thrown amongst them by the multitude, whereby several of the soldiers were bruised and wounded. In witness whereof, our said Chancellor and Clerk, in our name, have subscribed these presents, day and place foresaid. *Sic subscribitur,*

JO. INGLIS, *Chancellor.*
JAMES DAVIDSON, *Clerk.*

The Lord Justice Clerk and Lords Commissioners of Justiciary, having considered the verdict of assize returned against John Porteous, panne[illegible] this date, they, in respect thereof, by the mouth of John Dalgleish, dempster of Court, decerned and adjudged the said John Porteous to be taken from the Tolbooth of Edinburgh, upon Wednesday the eighth day of September next to come, to the Grass-market of Edinburgh, the common place of execution of the said burgh, betwixt the hours of two and four of the clock of the afternoon of the said day, and there to be hanged by the neck upon a gibbet, by the hands of the executioner, until he be dead; and ordained all his moveable goods and gear to be escheat and inbrought to his Majesty's use, which was pronounced for doom. *Sic subscribitur*,

AND. FLETCHER.
JA. MACKENZIE.
DA. ERSKINE.
WA. PRINGLE.
GILB. ELLIOT.

CURIA JUSTICIARIÆ, S. D. N. Regis, tenta in Novo Sessionis Domo burgi de Edinburgo, tertio die mensis Septembris, millesimo septingentesimo trigesimo sexto, per honorabiles viros, ANDREAM FLETCHER de Milton, Justiciarium Clericum, Dominos JACOBUM MACKENZIE de Roystoun,

et GUALTERUM PRINGLE de Newhall, Commissionarios Justiciarii, dict. S. D. N. Regis.

Curia legitimè affirmata.

THE said day the Lord Justice Clerk delivered a letter from his Grace the Duke of Newcastle, one of his Majesty's Principal Secretaries of State, whereof the tenor follows:

Whitehall, August 26, 1736.

MY LORDS,—Application having been made to her Majesty in the behalf of John Porteous, late Captain-Lieutenant of the City Guard of Edinburgh, a prisoner under sentence of death in the gaol of that city, I am commanded to signify to your Lordships her Majesty's pleasure, that the execution of the sentence pronounced against the said John Porteous be respited for six weeks from the time appointed for his execution. I am, my Lords, your Lordships' most obedient humble servant. *Sic subscribitur*,

HOLLES NEWCASTLE.

Directed on the back thus, "To the Right Honourable the Lord Justice General, Justice Clerk, and other Lords of the Justiciary at Edinburgh."

Thereafter, the said Lords gave their warrant to the Magistrates of Edinburgh for stopping the said execution, whereof the tenor follows:—By the Right Honourable the Lord Justice Clerk, and Lords Commissioners of Justiciary: Whereas her

Majesty, guardian of the kingdom, has been graciously pleased, by a letter signed by his Grace the Duke of Newcastle, one of his Majesty's Principal Secretaries of State, to signify her pleasure to us, that the sentence of death pronounced against John Porteous, late Captain-Lieutenant of the City Guard of Edinburgh, present prisoner in the Tolbooth of Edinburgh, which was to have been executed upon him upon the 8th day of September instant, be respited for six weeks from the time appointed for his execution. These, therefore, in obedience to her Majesty's commands, discharge and prohibit the Magistrates of Edinburgh, and all other officers of the law, from putting the foresaid sentence of death in execution upon the said John Porteous till the 20th of October next to come; on which day, the said Magistrates of Edinburgh are hereby required and ordained to put the former sentence of death in execution upon the said John Porteous, in all points, as they will be answerable. Given at Edinburgh, the third day of September, 1736 years. *Sic subscribitur,*

ANDR. FLETCHER.
JA. MACKENZIE.
WA. PRINGLE.

Extracted furth of the books of adjournal, upon this and the preceding one hundred and twenty-four pages, by me, John Davidson, Clerk to the Court of Justiciary.

JO. DAVIDSON, *Clk.*

PROCEEDINGS

IN THE TRIAL OF

WILLIAM MACLAUCHLANE.

CURIA JUSTICIARIA, S. D. N. Regis, tenta in Nova Sessionis Domo burgi de Edinburgo, undecimo die mensis Martij 1737mo, per honorabiles viros, ANDREAM FLETCHER de Milton, Justiciarium Clericum, Dominum JACOBUM MACKENZIE de Roystoun, Magistrum DAVIDEM ERSKINE de Dun, Dominum GILBERTUM ELLIOT de Minto, et Magistrum ALEXANDRIUM FRASER de Strichen, Commissionarios Justiciarii, dictos S.D. N. Regis.

Curia legitimè affirmata.

Intran.

WILLIAM MACLAUCHLANE, late servant to the Countess of Wemyss, prisoner in the castle of Edinburgh, pannel. INDICTED and ACCUSED at the instance of Duncan Forbes of Culloden, Esquire, his Majesty's Advocate for his Highness's interest, for the crimes of murder and fire raising, and others, as is more fully mentioned in the in-

dictment raised against him thereanent. Making mention, THAT WHEREAS, by the law of God, the common law, the municipal laws and practice of this kingdom, and the laws of all other well-governed realms, privy conspiracies to raise, procure, and move, and the raising, procuring, or moving seditious commotions of the people, mobs or tumults, in violation of the laws, repose, and tranquillity of the kingdom, or any part thereof; the convocating the lieges by beat of drum; and their assembling themselves riotously and tumultuously together, armed with guns, Lochaber-axes, or other warlike weapons whatsoever, within burgh, without the special licence of the Sovereign, or the Magistrates of the same; the surprising, invading, or seizing the guard room of any burgh or city, by force or violence, disarming and driving out the soldiers placed there, for the preservation of the public peace, and the taking away their arms; the violent and masterful seizing and securing the gates of any city or burgh, by numbers of dissolute and disorderly persons, riotously assembled, whereby the lives and property of the inhabitants were put under the power, and exposed to the rage and caprice of the giddy and profligate part of the people; the insulting, stoning, and resisting Magistrates in the due execution of their offices; the raising wilful fire, and forcibly breaking open the doors of public prisons, and by force, threats, or terrors, extorting the keys from the lawful keepers, and setting at large prisoners law-

fully confined for capital or other heinous crimes; and the committing wilful and deliberate murder, under cloud of night, in derision of public justice, in open defiance and contempt of his Majesty's laws and authority; and attended with circumstances of brutal cruelty, were most enormous and detestable; crimes destructive of the public peace; dangerous to the lives, liberties, and property of the subject; subversive of all laws, government, and society; odious and abominable in the sight of God and man, and most severely punishable: NEVERTHELESS, it was of verity, That the said William Maclauchlane had presumed to commit, and was guilty of all or one or other of the foresaid abominable crimes, aggravated as aforesaid: IN SO FAR AS, upon the 7th day of September 1736, or one or other of the days of the said month, certain seditious and blood-thirsty persons, shaking off all fear of God, regard and reverence to his Majesty's laws and authority, guided by disloyal and diabolical principles, or instigated by dangerous and desperate incendiaries, having feloniously conspired unlawfully to raise, move, and procure mobs and tumults, insult the laws and public authority, and in an outrageous manner to break and disturb the public peace in the city of Edinburgh; to do murder, and commit the other black and odious crimes after mentioned: Did assemble themselves together, within the said city and county of Edinburgh, about the hour of nine, or some other hour that night; and being armed

with clubs and other offensive weapons, seized a drum, in the possession of the drummer of Portsburgh, part of the suburbs of Edinburgh, and by beating the same within the said burgh, convocated and brought together great numbers of dissolute, profligate, and disorderly persons, who, proceeding to the Netherbow Port of the said city, by force and violence seized upon the keeper and keys thereof, shut and locked the gate, and marching to the guard room, where the city guard, constituted by act of Parliament, was in use to be kept, by force and violence seized the sentinel standing at the door, entered the same, and disarmed and drove out the soldiers placed there by the authority of the Magistrates, for the preservation of the public peace, and arming themselves with the guns, halberts, Lochaber-axes, and other weapons kept in the said room, for the defence of the city; sent parties to the several ports, and took possession of the same, shutting the gates, nailing, or rolling stones to secure the said gates: And having thus made themselves masters of the city, to the great fear, terror, and trouble, of his Majesty's lieges, to the imminent danger of shedding much blood, pillaging, plundering, and burning the houses of the inhabitants; they advanced towards the public prison of the said city, and planted some of their accomplices, armed as a guard, from the north side of the said prison, commonly called Purses, across the High Street, to stop all who did not unlawfully associate them-

selves with them, from passing to the prison gate; and with fore-hammers beat on the door of the said prison, in order to break it open; and among the rioters so planted as a guard, and at the prison door, and in divers other places during the said tumult and sedition, he, the said William Maclauchlane, armed with a Lochaber-axe, or other offensive weapon, was unlawfully and riotously assembled with them. And when the Magistrates of the city, as in duty bound, went in a body toward the said prison, to disperse this riotous and unlawful assembly, showers of large stones were by him, the said William Maclauchlane, or his accomplices, poured upon them, whereby some of them were bruised, and all of them under great terror, were obliged to fly and save themselves from the fury of an armed mob: AND FURTHER, he, the said William Maclauchlane, or his accomplices, by burning torches, links, whins, or other combustible matter, wilfully and maliciously set fire to the said prison door, to the great danger of the adjacent wooden houses, and other houses and shops; and having burnt and beat the same open, seized the keeper, and, by force and fear, extorted the keys of the rooms of the said prison from him, and dismissed William Grinsell, imprisoned there for murder; James Ratcliff, imprisoned for theft, robbery, and housebreaking; and divers other persons there, also committed by lawful warrants: And he, the said William Maclauchlane, having conceived a deadly hatred and malice against John Porteous, com-

monly called Captain Porteous, there also confined under sentence of death, the execution whereof, by the amiable power and prerogative of the Crown to shew mercy to subjects condemned, had been respited by her sacred Majesty the Queen, then guardian of the kingdom, he, the said William Maclauchlane, or his said accomplices, laid violent hands upon him, with intent to murder and bereave him of his life; and having dragged him by the heels down the said tolbooth stair, crying for mercy for Christ's sake, lengthening out their cruelty towards him, alternately led, dragged, and carried him, fainting and falling on the street, to the Grassmarket, within the said city of Edinburgh, the place of common execution, in derision of public justice, and making a stand at the gallows-stone, where the gibbet was usually placed, they consulted together in what manner to put him to death; and about the hour of eleven, or some other hour that night, having hurried him to a dyster's tree near the said place, while, in the most moving manner, he was supplicating for a little time to recollect himself, a dying man, and to beg mercy from God, he, the said William Maclauchlane, or his wicked accomplices, renouncing all Christian compassion, and even human nature, fixing a rope about his neck, instantly drew him up upon the said tree; and when he endeavoured to save himself, by catching hold of the rope with his hands, he, the said William Maclauchlane, or one or other of his vile associates, barbarously beat

them down with a padle, or other instrument, and brutally struck him upon the face with a Lochaber-axe, or other weapon; and wantoning in their wickedness, making loose the rope that was fixed about the said dyer's tree, he, the said William Maclauchlane, or some of his accomplices, let him down to the ground, and pulled him up again, where he hung by the neck till he was dead: All which detestable facts and crimes were impudently, wickedly, and maliciously done and committed by the said dissolute and disorderly persons, riotously and tumultuously assembled in manner above described; and the said John Porteous was cruelly murdered at the time and place aforesaid, in a daring and outrageous manner, to the dishonour of God, the contempt of his Majesty's laws and authority, and to the lasting infamy of the barbarous and bloody actors; and he, the said William Maclauchlane, was art and part of all, or one or other of the foresaid crimes, aggravated as aforesaid; which facts, or part thereof, or his being art and part in all or any of the foresaid crimes, being found proven by the verdict of an assize, before the Lords Justice General, Justice Clerk, and Commissioners of Justiciary, he, the said William Maclauchlane, ought to be most examplary punished with the pains of law, to the terror of others to commit the like in time coming.

Pursuers.

Mr Charles Erskine, his Majesty's Solicitor.
Mr Robert Craigie.
Mr William Grant; and
Mr Patrick Haldane. Advocates.

Prolocutors in Defence.

Mr Archibald Murray.
Mr Alexander Boswell.
Mr John Campbell.
Mr Andrew M'Dowall; and
Mr William Brodie. Advocates.

The indictment being openly read, and debate *viva voce*, in presence of the judges, pannel, and jury, the Lords ordained both parties to give in their informations to the Clerk of Court, in order to be recorded, the procurators for the pursuers to give in theirs against Monday next, the 14th instant, at six o'clock at night, and the procurators for the pannel to give in theirs against Thursday the 17th instant, at six o'clock at night, and continued the diet till Friday the 18th, and ordained assizers and witnesses then to attend under the pain of law, and the pannel to be carried to the place from whence he came.

14th March 1737.

INFORMATION

FOR

His MAJESTY'S ADVOCATE,

AGAINST

WILLIAM MACLAUCHLANE,—*Pannel.*

THE pannel was indicted and accused as guilty, or art and part, of the barbarous murder of Captain Porteous, and other atrocious and enormous crimes, that must appear detestable to every one not utterly lost to all sense of religion, humanity, and shame, not only from the dangerous and pernicious nature and tendency of the crimes, but also from the circumstances of unparalleled cruelty that attended the murder.

As the crimes for which he was indicted were of the most dangerous example, it was absolutely necessary to inquire and prosecute the barbarous actors, the rather that it concerned not only the welfare, but the honour of this part of the kingdom, to remove the guilt, and wipe off the reproach, that did arise from an impudent murder, committed in an open and daring manner, *as is at length* set furth in the indictment against the pannel.

To put the indictment, and facts therein contained, in a proper light, it was to be observed, that John Porteous, commonly called Captain John Porteous, one of the Captain-lieutenants of the City Guard of Edinburgh, with a party under his command, upon the 14th of April last, attended the execution of a sentence of death pronounced against Andrew Wilson; and, upon certain disorders that happened about the time of the execution, the said Captain Porteous was said to have fired, and to have ordered the party under him to fire among the multitude, whereby some were killed, and others wounded.

A prosecution was brought against him, and, upon a verdict returned, he was condemned to die; and the Magistrates of Edinburgh were ordered to put the sentence in execution, upon the 8th day of September last, betwixt the hours of two and four in the afternoon.

During the trial, and even the condemnation, the said John Porteous persisted to deny, notwithstanding the proof brought against him, that he either fired or gave orders to fire, when the slaughter and maiming was committed at Wilson's execution, which had so great influence upon persons of high rank, that petitions were signed by them to be presented to her Majesty, then guardian of the kingdom, representing his case as favourable, and recommending him as an object of mercy.

Whether the suggestions on the part of the said

John Porteous were just or unjust was foreign to the present question; but as the prosecution was brought at the instance of the Crown, and as, by a late act of Parliament, sentences for crimes importing capital punishment were discharged to be put to execution, till thirty days at least were elapsed from the date, the inductive cause whereof is expressed in the law, that parties convicted might have time to apply for a pardon, it was surely proper the Crown should inquire into the truth of the allegations of the petition presented in behalf of the said John Porteous; and, in the mean time, respite the execution of the said sentence.

A reprieve, granted for this end, was produced in presence of the judges, and entered into the books of adjournal, and an authentic copy of the proceedings against him was ordered to be transmitted to London.

The prerogative of the Crown to shew mercy to subjects condemned has ever been looked upon as amiable by all who have the heart of a man. The great Papinian, L. 7, ff. De Servis exportandis, in fine, says, 'Beneficio adfici hominem interest hominis penæ, non irrogatæ indignatio solam duritiem continet.'

And, indeed, such a power must appear necessary for the safety of the subjects, when, by the letter of the law, they are subjected to the severest punishments, while, at the same time, the Judges are of opinion, *durum est, sed ita lex scripta est*; and in such cases how happy is it, that the unfor-

tunate have a refuge, by throwing themselves upon the clemency of the Sovereign?

Upon this occasion no pardon was granted, nor intended to be granted, but upon proper inquiry; and as the respiting the execution of the sentence of death was at the same time an instance of tenderness towards the law and the life of a subject, it was to be hoped it would be received by all not only with respect, but with thankfulness. But as there are perverse minds capable of delight only from cruelty, and inclined to rage by acts of mercy, certain abandoned and blood-thirsty persons formed a project to kill and murder, and actually killed and murdered the said Captain Porteous, even before the day prefixed in the sentence pronounced by the Judges who condemned him; and as they could not effect their wickedness, but by passing through several scenes of previous villany, upon the 7th of September, in the evening, certain of the conspirators seized a drum, and by beating the same, convocated their accomplices, who seized and secured the ports, attacked and secured the City Guard, and drove out the soldiers, placed there by lawful authority, and armed themselves with warlike weapons, kept there for the defence of the city, to the great fear, terror, and trouble of the inhabitants, as well as the danger of their lives and properties.

As the chief thing in view was to murder the said Captain Porteous, this insolent mob proceeded to the tolbooth door; and as they foresaw it would

be difficult to break it open, it would be necessary to plant certain of their numbers as a guard across the High Street, to stop the Magistrates and others who might interpose from approaching to the tolbooth door; and a principal person in this guard was the said William Maclauchlane, armed with a Lochaber-axe; and the Magistrates having in a body proceeded that way towards the prison, they were, by showers of great stones, bruised and forced back under great terror.

The tolbooth door was at last burnt and beat open, and Captain Porteous was dragged to the Grassmarket, between the hours of eleven and twelve, and hung up by the neck upon a dyer's tree, in the barbarous manner charged in the indictment, where he remained till he was dead.

When the trial was brought on before the Court of Justiciary, the procurators for the pannel insisted upon several dilatory and other defences, and, since the pleading, have added some others, and the debate was now to be laid before the Court by informations.

First Defence.—The defence that in order was first to be determined, resolved into a declinature of the Court, namely, That the facts as set forth in the libel amounted to high treason, which could only be tried by a commission of oyer and terminer; and that the charge amounted to high treason was endeavoured to be supported from the proceedings in the case of Peter Messenger and others, the 4th April 1668; and from the trial

of Daniel Dammaree and others, anno Annæ 1710.

Answer First.—To this it was answered, That in illegal proceedings, criminal upon many considerations, the same *species facti* may be the foundation of divers actions, and the prosecutor has it in his power to insist upon which statute or ground in law he thinks proper. If a traitor in rebellion kills one of his Majesty's subjects, though it is an act of treason, and as such may be prosecuted; nevertheless, it is murder, and as felony may be tried; nor could the pannel be listened to if he suggested that it was true he might be a murderer, yet he could not be pursued as a felon, in regard he was a higher offender, and must be punished as a traitor. This was a defence so absurd, that it hardly deserved to be noticed.

It was a question treated by the Civilians, Antonius Gomesius, Comment. Resolut. Juris Civilis, Tom. III. c. 1. De Delictis, Num 38, et seq. "Si delictum aliquod reperiatur punitum pluribus legibus an debeat reus delinquens ex una vel ex omnibus, vel ex aliqua accusari et condemnari?" And certain rules are established by them, whereby one may determine when a first trial does or does not exclude a second, upon a different statute or ground in law, and sometimes it does, and at other times not; but it was never ever doubted, and is supposed by all lawyers, that the prosecutor has it in his power to insist against any offender, for any crime whereof he is guilty, though

the *species facti* afforded a ground for a prosecution of a different nature. Therefore, seeing the facts in the indictment are not charged as treason, if they were sufficient to support a sentence against the panuel as a felon or other delinquent, the Court could not suffer such a defence to proceed from the mouth of his prosecutors as this, that he was a traitor and not a felon.

Answer Second.—And here it was to be observed, the Court was competent, even supposing the prosecution had been for high treason. For though, by the act septimo Annæ, her Majesty, her heirs and successors, are empowered to issue out commissions of oyer and terminer in Scotland; yet it is thereby further enacted, "That the Justice Court and other courts, having power to judge of high treason, and misprision of treason in Scotland, shall have full power and authority, and are thereby required to inquire of all high treasons, and misprision of high treason, and thereupon to proceed, hear, and determine the said offences whereof any persons shall be indicted before them." Whereby the competency of the Court was evident, though other methods of proceeding would have been requisite, which in this case, where the crimes were not charged as treason, but murder and sedition, it was unnecessary and improper to observe.

But it was without foundation averred, that the indictment as framed, amounts to high treason. It was very true, that the facts there set forth were

so monstrous and big with so many crimes, that one might be easily pardoned to search out for the worst name that could be found to express the guilt of the criminals. But at the same time, levying war against the King was not directly charged; nor did the facts as laid in the indictment fall under any interpretative levying war against his Majesty.

According to the indictment, the chief aim of the conspirators and of their associates was to murder Captain Porteous, and for this purpose, the rioters armed themselves, broke open the prison, and committed the other crimes enumerated in the proposition of the indictment, and supported by the facts in the subsumption. Therefore, the whole of the convocation being only upon a private and particular design, it was no levying war against the King.

Neither was it of any moment in this question, that it charges the releasing of felons, and others committed by lawful warrants. For, if men levy war to break prisons, to deliver one or more particular men out of prison, unless such as are imprisoned for treason, this, upon advice of the judges, upon a special verdict at the Old Bailey, was found not to be high treason, but only a great riot, anno 1668. But if it were to break prisons, to deliver persons generally out of prison, this is treason, as is observed by Lord Chief Justice Hale, in his Historia Placitorum Coronæ, Cap. 17.

Nor did it support the plea, that the murder

was done contrary to the respite granted by her sacred Majesty the Queen, then guardian of the kingdom. This did, indeed, highly aggravate the felony, and was taken notice of in the subsumption of the libel as such; but indeed, every felony is committed in contempt of his Majesty and his laws, but it does not follow that every felon is to be adjudged a traitor.

As to the instances appealed to, they could give no assistance to the pannel's plea; for, as to the case of Peter Messenger and others, anno 1668, they were indicted as having assembled themselves *modo guerrino*, to pull down bawdy-houses, and because it was so laid in the indictment indefinitely, some of the judges of great ability even doubted whether the charge could amount to high treason, but all of them agreed, that if the intention was only to pull down two or three particular bawdy-houses, the charge could not amount to treason, as was evident from the authority of Sir Mathew Hale, in the forecited place, and from Keyling's Reports; and in the same manner, as the indictment does not insinuate, much less aver, that the conspiracy and convocation was to release all prisoners, or any prisoner committed for high treason, the indictment, as it stands, does not amount to high treason.

The proposition of the indictment formed agreeable to the custom of Scotland, mentions only the discharging of prisoners committed for capital crimes; whereas it behoved to have

charged either the crime of levying war, to release all prisoners, prisoners committed for high treason, the indictment, as it stands, does not amount to high treason, if the pursuer had intended, or could have had access to prove high treason against the pannel; and it subsumes only upon the release of prisoners from the tolbooth of Edinburgh, and particularly specifies the felonies for which the prisoners were confined there.

The same answer served for the case of Daniel Dammaree in the reign of Queen Anne; for the chief article found to be treason there was the levying war, to pull down meeting-houses in general, and not one or two particular meeting-houses.

And as to what was suggested in the case of Peter Messenger and others, the chief articles mentioned in the indictment against Bedell and Latimer was the setting felons at liberty. The answer was obvious from the Lord Chief Justice Keyling's report of that case, wherein he says, for the same reasons we hold the verdict to be full also against Latimer, because it was found that the multitude was assembled, as in the indictment, in pretence of breaking prisons and releasing prisoners in general, which is agreed by all except the Chief Baron to be treason.

From all which, it was plain that there was not the least foundation for a plea against the competency of the Court, or legality of the proceedings

upon this ground; and, therefore, the prosecutor should proceed to the other defences.

The procurators for the pannel, before entering upon the exceptions to the indictment or grounds of exculpation, observed, That the pannel was a man of poor parts and low rank, incapable of contriving or executing a project such as is set forth in the indictment; therefore, they had just reason to complain that he alone was brought to a trial.

To this it was answered, That whether the pannel was an original conspirator, or whether he was only a desperate tool in their hands, was not at all material in the present debate. Designing hands accomplish their dangerous designs by wicked hands; and, according to law as well as to the rules of reason and good policy, both are to be severely punished, otherwise dangerous incendiaries would ever be provided with instruments to put in execution their villanous projects.

It would be endless, as well as impossible, when madness and lunacy is not insisted upon, to enter into an examination of the degrees of understanding offenders are endued with. The pannel had capacity enough to know, that murder and the other crimes charged upon him were punishable by law; and criminals of all ranks and sizes of understanding above that of an idiot are to undergo the same punishment. In this particular, as we [illegible]us in others, *facinus quos inquinat æquat*; and if the pannel could assist the prosecutor to discover

offenders of greater size or more dangerous than he, or if they could have been taken into the custody of the law, there should have been no ground of complaint that he stood alone in the pannel.

After this preamble, it was suggested against the relevancy of the libel.

First Exception to the Relevancy.—*Primo*, That the indictment was improperly formed, in as much as it averred that the facts were committed by the pannel or his accomplices, whereas they ought to have been charged to have been committed by himself without an alternative.

Answer.—It was answered, That, as there were a chain of crimes, tending all to one particular wicked end, it was surely not necessary to aver that the whole was committed by the pannel; therefore it was sufficient to charge that the same was committed by him or his accomplices. In as far as by the proof the direct facts were fixed upon himself, there he was a principal, and in as far as by the proof it should appear that he was aiding and assisting to others, there he was art and part, which is charged upon him in the indictment.

It was said, That circumstances ought to have been laid in the indictment from which his accession was to be proven. This was pleading directly in the face of the act 151, Parl. 12. Ja. VI. Sir George Mackenzie, Tit. Art and Part, observes, That before the making of that act the pursuer was obliged to libel, that the defender was accessory

to the committing, and so guilty of the crime, in so far as, &c. and condescended upon the manner of accession, that is, charged the circumstances from which it appeared those who committed the crimes were accomplices to the pannel; and this exception, which was expressly taken away by the foresaid statute, was *in terminis* the same now insisted on for the pannel

Exception Second.—It was faintly objected, as an imperfection in the indictment, that the accomplices were not named; and this was endeavoured to be supported by the authority of Sir George Mackenzie, who, in the foresaid title, Art and Part, says, Though it be sufficient to libel, generally, that the accomplices are art and part, yet the libel must bear who are accomplices.

Answer.—The naming of accomplices neither was nor possibly could be required in an indictment in any country in the world By the law of Scotland, if the libel charged the criminal fact to be committed indefinitely without naming any person whatsoever, and that the pannel was art and part, it is relevant without exception; and what Sir George Mackenzie says was no more than this, founded upon the 76th act, 6th Parl. Ja. VI. That an indictment or summons to charge accomplices in general to appear, could not be a foundation for trying any person not named, as if the indictment had not been against William Maclauchlane, but against the accomplices of the murder of Cap-

tain Porteous; and in that case to be sure he had a good objection against being tried upon such indictment; and this was evident from looking into the statute itself.

As there are divers crimes enumerated in this indictment, and among others an unlawful convocation and assembly with arms within burgh, without the special licence of the Sovereign or of the Magistrates of the place, and as the pannel was charged with having been in arms among the guard planted at the Purses, whilst his accomplices were breaking open the prison door, and that there and in divers other places during the sedition, he was riotously assembled with them; the procurators for the pannel judged it material for him to suggest, that simple presence, or *nuda assistantia*, though in arms in an unlawful assembly, even within burgh, could not be the foundation of inflicting a capital punishment.

Objection First.—Upon this subject it was argued, That though there are laws and acts of Parliament which seem to inflict the pain of death upon persons there assembling themselves within burgh in arms, yet these laws were severe and now in disuse, and were never insisted on but in arbitrary times. Therefore, though the pannel should be proved to have assembled himself in arms with the multitude, unless it was also proved he had direct accession to the seizing the guard, to the unlawful fire raising, breaking open the tolbooth, or

murder of Captain Porteous, he was to be punished only by an arbitrary punishment.

Answer.—To this it was answered, That, by the 77th act, 14th Parl. Ja. II. the rising of commons in hindering the common law, or being found in manrent, or in feir of weir with any man but with the King or his officers within burgh, are discharged under pain that their lives shall be in the King's will, and their goods confiscated to him. And by the 75th act, Par. 9th, Q. Mary, it is statuted, that no person or persons, of whatsoever quality, condition, or degree, attempt to raise bands of men of weir on horse or foot, armed with bellical instruments, for dayly, weekly, or monthly wages in any time coming, under pain of death, to be executed upon the raiser of the bands, and also upon them that rises and conveens in bands. But as this law related only to raising of men in arms to continue for some time by the 83d act of the same Parliament, the case of tumults within burghs, which were found to be of most pernicious consequence, is provided for, and it is enacted, "That none of the leidges presume to make privey conventions nor assemblies within burgh, put on armour, make sound of trumpet or tabron, or use bellical instruments, whatsoever, without the special license of the Sovereigne and the Magistrates within burgh where the tumult chances to be, under pain of death."

This act of Parliament of Queen Mary is ratified by the 17th act, 18th Parl. Ja. VI. and or-

dained to be put to due execution against the contraveners, with this addition, That no person presume to convocate or assemble numbers of persons even without arms, or attempt any thing to the derogation or violation of the acts of Parliament or constitutions of the burgh, under the pain of being punished in their bodies and goods with all rigour, conform to the laws of the realm.

Upon these laws many proceedings have been had before the Court of Justiciary, as is evident from the books of adjournal, particularly the 26th November 1664, Strachan was indicted, and the indictment was found relevant to infer the pain of death.

Alexander Chinzie and others anno 1662, and David Moubray upon the 8th of February 1686, and Alexander Keith upon the 26th of the same month, were indicted upon these laws; and the indictment was found relevant to infer a capital punishment, and several of them were hanged. It was suggested that these proceedings were had in arbitrary times; and the prosecutor here did by no means put in a plea to defend all the judgments in that period of time, too much influenced on some occasions by arbitrary and despotic power, from which we were by good providence rescued by the happy Revolution. But, at the same time, he could not admit that all the precedents from the Restoration down to the Revolution are by the bulk to be rejected. On the contrary, it was certain, that then our country had the honour and

happiness of lawyers of the greatest ability and learning, who exerted themselves with success, and whose arguments prevailed. And neither before the Revolution nor since, when these laws were founded on, was there the least vestige remaining that could make any one believe it was the opinion of the great lawyers who then lived that these statutes were gone into desuetude; for, supposing for once, (which was not however true,) that in all the cases before the Revolution the acts were extended beyond just bounds, yet still the proceedings had upon them put an end to all objection, as if they had gone into desuetude by non-usure.

In the case of Captain Bruce, 1st April 1691, who was arraigned as guilty of a commotion within burgh, these acts of Parliament were founded upon; and though Sir James Stewart in the trial appeared as procurator for the pannel, yet he neither suggested that the acts were in desuetude, nor that they were branded by the claim of right as old and obsolete, the article of the claim of right relating to sentences upon stretches of old and obsolete laws, referring particularly to the laws in relation to leasing making, upon which a noble Lord was unjustly condemned and forfeited.

So far was Sir James Stewart from considering these laws as old, obsolete, or unjust, that, anno 1690, he brought an indictment against Weir and others, founded upon these laws, and the proceedings in that case should afterwards be more particularly observed.

When the matter of these laws is considered, they must appear extremely reasonable, when there is a commotion within burgh of persons unarmed, many, from curiosity, are drawn to mingle with the multitude; and it would be extremely hard, that *nuda assistantia*, or bare presence there, should subject an innocent person to the high penalties. But, when there is a sedition and commotion of the people that proceeds so far as that they arm themselves, not only are his Majesty's subjects put in fear and terror, but the community and the particular persons inhabiting within the burgh, are in the utmost danger. No man can tell how much blood may be shed, how many houses burnt, and what the dismal consequences may be, when the waters become so troubled, by stirring up the dregs of the people in arms. Even the community itself may be brought in danger, and to great trouble and expence; and, therefore, if rioters their assembling themselves in arms are punished upon such occasions with the pain of death, it was far from appearing to be too severe or hard; on the contrary, it rather seems necessary for the supporting of government and good order.

And if the laws of other countries are looked into, it will be found that other nations have had the same opinion as our ancestors, when they enacted the foresaid laws. In burghs, where there are multitudes of people living upon the same spot of ground, great numbers are easily assembled, and great mischiefs may be done that cannot possibly

be prevented. The same danger is not from convocations in less populous places; and, therefore, the law was confined to commotions within burgh.

What the opinion of the Roman lawyers was is apparent, from the L. 38, ff. *De Pœnis*, and the L. 1, ff. *ad Legem Jul. Majest.* and many other laws, that might be mentioned, and the learned Sande, Lib. 5, Tit. 9, *De fin.* 12, in his Collection of Decisions in Friseland, relates a commotion and outrage, not unlike that mentioned in the indictment, that happened in Friseland; and, after reasoning on the legal and proper punishment, observes, that the seditious persons were put to death.

Here it was urged, That, in the case of Weir, in the year 1700, the being in arms in a convocation was not sustained relevant to infer the pains of death; neither in the case of the Glasgow riots, nor some other late riots referred to.

To this it was answered, That, in the case of Weir, the riot was libelled as raised of a sudden, without any previous conspiracy, and not at all of the same kind as the commotion and sedition charged against the pannel; of which the scope and principal aim was the murder of captain Porteous, which was known from the moment the tumult began, between nine and ten o'clock at night, through the whole town; and those who associated themselves with the rioters in arms, especially in so remarkable a manner, as to guard

the rioters who were breaking open the prison door, were plainly accessory to the murder. In every view, the assembling one's self riotously and tumultuously in arms within burgh was criminal, and prohibited by the law. But the joining, when the intent and purpose of the commotion was known, was criminal in the highest degree; wherefore, however, as in some particular instances, as in that of Weir, the acting and assisting with a drawn sword, or bayonet, in the convocation, *per se*, was only found relevant to infer an arbitrary punishment, because it arose from a sudden fray, as it was expressly libelled in that case, yet, where the rising and arming was with intent to commit murder, and the murder was actually by them committed, there was not the least reason why the law should not be put in execution: that the persons assembling themselves within burgh in arms, without licence of the Sovereign, or of the Magistrates, should be punished with the pain of death.

The reason of this was extremely plain; for, if divers persons make a fray, for an unlawful purpose and end, the deed of one becomes the deed of the whole, because they are versant in *re illicita*.

Sir Mathew Hale, cap. 34, p. 445, lays it down, that in the case of a riotous assembly, to rob or steal deer, or do any other unlawful act of violence, there the offence of one is the offence of all the company; and this he illustrates by several exam-

ples, and particularly that of the Lord Dacre and divers others, who came to steal deer in the park of one Pelham. Raydon, one of the company, killed the keeper of the park, the Lord Dacre and the rest of the company being in the other parts of the park, it was ruled, that it was murder in them all, and they died for it.

This was likewise plain, in the case of burglary, where, standing as a guard at an entry to a house, though at a distance, will undoubtedly make the person who watches aiding and assisting to the burglary.

And if being assembled with a company who go about an unlawful act, will make them all guilty of a murder happening, though beyond the first intent or design. Who then could doubt that, if the pannel was in arms, and made part of the armed mob assembled on purpose to commit murder, the deed of any one of these with whom he was riotously and tumultuously assembled in arms, was his deed; or that, when he stood as a guard to those who were burning and breaking open the tolbooth, he was guilty of the wilful fire raising and effraction of the prison, of murder, and all the wicked consequences that followed?

Even in the case of Weir, the Lords found that part of the libel, of having a drawn sword, or bayonet, or other bellical instrument, or fore hammer, and thereby assisting by presence at the burning of the tolbooth door, for effraction thereof,

relevant to infer the pains of death. And how directly this applied was apparent at first sight.

As to the case of the rioters at Glasgow, and the mobbers in Fife, the libels did not bear that they assembled themselves in arms; and the fact is, that, in the case of Glasgow, which was the most atrocious, the mob had no arms in their hands till after the whole outrage was committed.

The prosecutor, therefore, humbly insisted, That, both agreeable to the laws and acts of Parliament, to reason, and the current of decisions in the Court of Justiciary, and the principles of law, that part of the indictment bearing, that the said William Maclauchlane was armed with a Lochaber axe among the rioters, planted as a guard, when his associates were breaking open the prison door, who at length did actually burn and break it open, and murder Captain Porteous, was *per se* relevant to infer the pain of death.

The procurator for the pannel proceeded, in the next place, to offer certain grounds of exculpation.

First Ground of Exculpation.—Primo, It was alleged that, upon the 7th of September, the pannel was extremely drunk, incapable of will, and of *dolus malus*; and, therefore, though he had been unlawfully assembled with the rioters, and even in arms, he could not be punished *pœna ordinaria*.

Answer.—To this it was answered, That the procurators for the pannel pleaded the indulgence of law to drunkards too high; that, if their position

law was just, under colour of a very unlawful act, a door would be opened to the greatest mischiefs.

In civil actions, drunkenness is allowed to come under the consideration of the Judge, when one is to be restored against a contract, the spawn of imposition, only in odium of fraud, and the fraudulent person. But this can never apply to the doctrine of crimes; on the contrary, lawyers say that, when one is drunk and commits a crime, peccat dupliciter primo propter ebrietatem deinde propter crimen, et quia culpa, præcessit casum, et dedit operam rei illicitæ, non debet eum ebrietas excusare. Andr. Gaill. Pract. Obs. Lib. 2. Obs. 110, § 25. et seq.

All lawyers agree that levis or modica ebrietas non excusat, nec minuit delictum, Muscard, de Probat Conclus. 580, No. 9, and Conclusion 589, No. 1. Jac. Minochius de Arbit. Judicum questionibus, Cent. 4, Cas. 326, No. 6 and 7. And there is no balance in which the degrees of drunkenness can be weighed and certainly known; and, under favour of this vice, ill disposed and malicious persons would encourage themselves, and raise a buckler against the sanction of the law.

This question has been treated by lawyers of all nations. The learned Gaill, in the place above referred to, observes, That, if a party is intoxicated unwarily, vini ignorata, vi deceptus, there is some compassion to be had towards him. Sed quando quis, ex habitu et consuetudine, sciens prudensque inebriatur, he can plead no privilege. And the

learned Mathæus, De Crim. Prolegom. cap. 2, § 13, in fine, explains and follows this distinction.

Sir Mathew Hale, in his Pleas of the Crown, cap. 4, says, that, by the laws of England, drunkenness shall have no privilege by the voluntary contracted madness; but the person intoxicated shall have the same judgment as if he were in his right senses.

Sir George Mackenzie, in his Treatise of the Criminal Laws of Scotland, after taking notice of the distinction *inter ebrios et ebriosos*, laid down by the Civilians, says, that those who are habitually drunkards should be more severely punished than others, because they are both drunkards and criminals; and observes, that he has not found in our laws drunkenness sustained as a defence in any case, and that it was repelled in the case of murder against the Laird of Spott and Douglas, anno 1667; and the procurators for the pannel did not so much as insinuate in the pleading, that he was deceived into drink, but that he was a lover of tippling, which is no defence at all.

As to what is said that *dolus malus* is of the essence of a crime, that does not hold in all cases, as in several instances might be shewn, where *lata culpa* is punished capitally. Gaill, Lib. 2. Obs. 110, § 25 and 26. Ubique probatur culpam ad casum ordinatum noxiam esse. But this case was none of those examples; for the pannel could not act as a sentry in arms, or otherways concur with the mur-

derers of Porteous, whose design was so notorious, without manifest and atrocious dole or ill design.

Second Ground of Exculpation.—The defence was put in another shape; and it was argued, That, though possibly law would not protect a pannel from punishment in the more atrocious crimes, where he was a principal, yet, in as far as he was charged only with presence in arms, drunkenness seemed to be a reasonable defence.

Answer.—It was answered, That convocations in arms, within burgh, are extremely dangerous, and highly criminal; and, if all who are pleased to intoxicate themselves with drink, and thereby inflame their fury and madness, may assemble themselves *impune* with arms, such pernicious meetings would become not only more frequent but more outrageous; and, therefore, it was necessary subjects should know, that, if they presume, when under the power of drink, to commit capital crimes, they must submit to capital punishments when they are sober.

Third Ground of Exculpation.—The procurators for the pannel insinuated, rather than averred, that the pannel was, by force and fear, constrained to take a Lochaber-axe, or halbert, and go along with the rioters.

Answer.—It was answered, That, if a man is menaced with beating, or even with death, if he will not commit murder, or other atrocious crime, the fear of death would not excuse him, if he commit the fact. (See D. Hale, Placit. Cor. p. 51.) But, in this case, it was entirely affected; for, how-

ever that might be a colour for his holding the arms for some minutes, yet, as it was in a great crowd, and under cloud of night, he had it in his power to have escaped. But, by the indictment, he continued armed among the rioters, which was inconsistent with the exculpation now pled. Neither were the circumstances or qualifications of force offered which would be necessary if the defence were to be sustained.

Fourth Ground of Exculpation.—It was pled for the pannel, That, while a great many of the outrages charged upon the mob were committed, he was *alibi*, in so far as, having been sent off an errand by his lady to Craigiehall, he did not return that night till about half an hour after nine; and that he went directly to his lady's house, and from that to John Lamb, vintner in the Parliament Close, where he remained till within a quarter of eleven.

Answer.—There were many answers that offered themselves to this defence *alibi*, which ought therefore to be repelled. As the circumstances are set forth, the pannel behoved, between nine and ten that evening, to pass by the West Port in his return from Craigiehall. Now, about this time, the fray began at the West Port, and it was very possible, nay, upon the circumstances as offered, probable, that the said William Maclauchlane was present at the very first convocation, went along with the rioters to the guard, and might have continued with them for some time, and afterwards have gone to repair himself from his fatigue by a little drink, in

order to enable him to go through with the remaining labours of the night; and of his own shewing, he had joined the mob long before the murder was committed; therefore, the *alibi* was such as could bear no weight.

By the law of Scotland, and, indeed, by the law of several other countries, (Bald. in L. Fin. Cod. de Prob.) defences contrary to the libel were not admitted, it being held a maxim, that quando delictum est plene probatum per testes affirmantes, non est admittenda contraria probatio per testes negantes. And, as it is charged in the libel that he was in the place where the facts were committed, it was expressly contrary to it to allow him to prove that he was in another place. However, the defence of *alibi* was so favourable, that it had been admitted of, but under this restriction, that circumstances should be laid down which, if proven, rendered it morally impossible that the pannel could be guilty of the crime charged upon him. Sir George Mackenzie, tit. 22. of Exculpation, § 3, says, That, if the Judge find *alibi* not to be clearly qualified, then he should only allow the pursuer to prove his libel, for to admit contrary probations were to open a door to perjury.

Now, in this case, Lamb's house was not above a hundred or a hundred and fifty yards from the prison door, and the Purses, where the pannel is charged to have acted as one of the guard to those who were beating with intent to break open the prison door; and no instance could be produced in the

Books of Adjournal where an *alibi*, in these circumstances, was admitted to proof, especially when it did not tend to exculpate from the crime, but certain previous steps towards it.

It was further here to be observed, that a proof to answer the pannel's intention was hardly possible in this case; for, suppose he staid but half an hour in Lamb's house, in order to know from what part of the mob's proceedings it could exculpate him within a minute or two, it must be proved when he went in and came out from Lamb's house, and the precise minutes when the several outrages were committed; for, in a minute or two he could have gone to the tolbooth door, and without proving so minutely and precisely, his *alibi* could not tally, to defend him against the crimes charged. But this was only mentioned to shew that it was one of the most ridiculous and insufficient *alibis* that ever was pled.

It should only further be observed, that the several grounds of exculpation pled were inconsistent with one another. It was said that he was dead drunk, and incapable of sense or action; and, at the same time, that he was forced to take arms, and become one of the rioters; and further, that he was not present. But, in short, the drift of all this was to get into a proof of negatives, in opposition to the rules of our law, and the danger of breaking through them was apparent.

To conclude this information, the competency of the Court was beyond all exception, as also the relevancy of the indictment, both as to the particu-

lar crimes mentioned in the proposition, and the circumstances laid in the subsumption against the pannel, as having been riotously and tumultuously assembled in arms with the rioters, planted as a guard to protect those who were beating and burning open the tolbooth door, with an intent to commit the murder, as also with regard to the barbarous murder, and the art and part thereof, which was the scope and principal end of the sedition from the beginning, as was not only known while the thing was transacting, but appeared by the unlawful assembly their disbanding after the unfortunate man was murdered by them, the defences offered altogether irrelevant, and ought to be repelled; and, if the pannel should be proven to have been accessory to the transaction of that night, he surely deserved the severest punishment; seeing, if a check was not given to such insolent cruelty, barbarity, and outrage, and the trampling upon all laws, human and divine, peace and quiet was at an end, and the lives and properties of every one who resided in the metropolis of this part of the kingdom were for ever hereafter to be held by the precarious tenure of the good-will, pleasure, and caprice of the lees of the people.

In respect whereof, the indictment ought to be found relevant, the defences repelled, and the pannel put to the knowledge of an assize.

(Signed) CH. ARESKINE.

INFORMATION

FOR

WILLIAM MACLAUCHLANE, Prisoner in the Castle of Edinburgh,—*Pannel*,

AGAINST

His MAJESTY'S ADVOCATE,—*Pursuer*.

THE libel sets forth, "That certain seditious and blood-thirsty persons, having feloniously conspired to raise mobs and tumults, did, on the 7th of September last, assemble themselves in the city of Edinburgh, about the hour of nine that night, and being armed with offensive weapons, seized a drum, and, by beating the same, brought together a great number of disorderly persons, seized on the keeper of the Nether Bow Port, and keys of the same, and shut the gate, and proceeded to the guard room, disarmed and drove out the soldiers placed there; and, arming themselves with guns and other weapons kept there, sent parties to several gates, took possession of them, and shut the same.

"That having thus made themselves masters of the city, they advanced towards the public prison, and planted some of their accomplices as a guard, from the north side of the prison, called the Purses,

across the street, to stop all who did not unlawfully associate themselves with them from passing to the prison gate: That, among the rioters so planted as a guard at the prison door, and divers other places, during the said tumult, the pannel, armed with a Lochaber-axe, was unlawfully and riotously assembled.

"That when the Magistrates went in a body towards the prison, the pannel, or some of his accomplices, threw stones upon them in great numbers, whereby some of them were bruised, and all of them in great terror, were obliged to retire: That he and his accomplices set fire to the prison door, and having burnt and broke open the same, seized the keeper, and dismissed two persons imprisoned for capital crimes, and others for other crimes.

"That the pannel having conceived deadly hatred against John Porteous, commonly called Captain Porteous, there confined under sentence of death, the execution whereof, by the prerogative of the Crown, had been respited, he, or his accomplices, dragged him out of prison to the common place of execution, and about the hour of eleven that night, hanged him on a dyer's tree, (in the barbarous manner set forth in the libel,) where he hung till he was dead."

That the defences for the pannel might appear in a true light, the counsel for him appointed by the Honourable Court should set forth his case as

it truly was: "He was footman to my Lady Wemyss at the time, and was sent by her ladyship the forenoon of that day, the 7th of September, to Craigiehall and Gogar, on an errand, and got drunk to such a degree that, when he returned, he was not capable to deliver the letter he had received, but which behoved to be done by another.

"The pannel, soon after his return from Craigiehall, went from my Lady Wemyss's house to John Lamb's, an alehouse in the same stair, half an hour after nine; when he entered Lamb's house he staggered with drunkenness, and was detained there till within a quarter of eleven, and then went out in order to go to his own house in the Canongate: That, in passing, he called at Mr Cassie's, vintner, and drank a chopin of ale or two with the servant there, and betwixt Lamb's and Cassie's fell once or twice.

"That, strolling in his drunkennesss through the street, he met two baxters, who carried him away with them to the mob, and whether they put a Lochaber-axe in his hand or not, he did not remember; but from the computing the time the mob had proceeded so far, that Mr Porteous was in their hands on the street before he mingled with the rioters; that he had no active part in what remained, nor indeed was capable, being overpowered with liquor.

"That all this while the pannel was in his ordinary livery habit, and went home to his bed,

and did not attempt to fly or abscond next day, or at any time thereafter."

The counsel for the pannel were by no means to justify this extraordinary riot, since they considered all mobs and tumults as directly repugnant to the ends of civil government, calculated to preserve peace and good order, and to secure people against all riotous commotions; and though this in question did only perpetrate the design in killing Mr Porteous without doing any other harm, yet sure when they had the power in their hands, no man's life or property was in safety.

But they to whom the defence of this pannel was enjoined, must not omit what could be offered in his behalf, and therefore observed, in the first place, "That the matter laid in the libel seemed to amount to the charge of high treason, and that, therefore, it ought to have been prosecuted as such; conform to the laws to that purpose, 7mo Annæ, cap. 21."

To evince this, the breaking of prison, and setting felons at liberty, one of the articles of this libel, was high treason, as was found in one of the judgments against Peter Messenger and others, indicted for high treason, in tumultuously assembling themselves in Moorfield, under colour of pulling down bawdy-houses. State Trials, Vol. II. page 31, April 4, 1668.

And, further, from the above case, and another on the like occasion, viz. the trial of Daniel Dammaree and others, for high treason and levying

war in the kingdom, under the pretence of pulling down meeting-houses; State Trials, Vol. VIII. Trial 57th, 9no Annæ, 1710; it was plain that the riotous assembling of people under colour of reforming what they complain of as grievances, is adjudged as high treason, and the present case as libelled was of that nature.

In the first of these cases, the riotous tumult pretended to reform the abuse of bawdy-houses. But because, under that colour, they might have pulled down honest people's houses; and no man could be safe if every man reformed what he would, therefore it was deemed high treason, because such rioters took on them the royal authority.

In the other case a great outcry was made on occasion of Doctor Sacheverel's trial against the dissenters' meeting-houses; and the mob then raised in London took on them to burn and demolish all their houses. Now, their attempting to reform by force any thing as an imagined grievance that was established by law, was opposing the public, and therefore judged high treason.

In the present case, besides the outrageous acts of violence libelled, the circumstance of Mr Porteous having got a respite of the capital sentence, and the mob's taking upon them notwithstanding to put him to death as a notorious criminal convict, was plainly an attempt to reform what they imagined a grievance, and therefore high treason. For to endeavour to reform by force any

thing people complain of, is levying war against his Majesty; for such persons take on them the royal authority, which is against the King.

This must certainly raise this act of violence to the character of high treason, since, in direct opposition to the act of grace granted by her Majesty, then guardian of the kingdom, the riotous mob put a person to death, from which, by the prerogative of the Crown, he was reprieved. This was flying in the face of the Government in the most direct manner, and levying war to counteract by force the will of the Sovereign.

To set this matter in its true light, let it be considered, that, in the original state of nature, all men were judges and executioners against malefactors. This manifestly appeared from the case of Cain, the first murderer. He, upon imbruing his hands in his brother's blood, being conscious that every one that found him had a right to slay him, applied to Almighty God for a safeguard against that danger, which was accordingly granted. Gen. iv. ver. 14. *et seq.* Hence it is plain, that, without such protection, all men would have used their natural right against him, and put in execution the fundamental law, "that whoso sheddeth man's blood, by man shall his blood be shed." Gen. ix. ver. 5.

But, after the erection of civil government, the power of judging and executing criminals devolved upon the public authority; so that, in this case, according to the law, it is equally murder for a private person to kill a man guilty of capital crimes as one

perfectly innocent, because such killer has no power over the life of the one more than the other, though, in a moral consideration, there is a vast difference.

To proceed, if the guilty person was under sentence of death, and thereafter pardoned or reprieved by the Sovereign, as was the case here, the violent putting him to death by an armed multitude seemed to aggravate the matter so far as to raise the crime to high treason, since it was preventing the exercise of that prerogative whereby the King may pardon the greatest offenders.

It was argued in behalf of the Crown, That the matter charged in the libel did not amount to high treason, nor fall under the above two cases; for that in these there was a general intention in the one to pull down all bawdy-houses, and in the other all meeting-houses. And, as to the judgment concerning the breaking of prisons, there was likewise a general intention to set at liberty all prisoners; whereas, in this case, there was only a particular design of murdering Mr Porteous, which was only a crime against him, and not against the public.

But truly this case seemed more to touch the royal authority and prerogative than any of the above cases. The Crown had granted a reprieve to Mr Porteous, a person condemned for murder, the rioters imagining it was a grievance, that the crime, of which he was adjudged guilty, was within the reach of the royal clemency, since they imputed to him the death of many innocent persons, and expected for certain that his blood was to make an

atonement for theirs, did take upon them to sign in effect a dead warrant against him, and in the most audacious manner to execute it, they antedate the day of his execution, that the reprieve should not as much as commence. If this was not high treason, and flying in the face of the government and royal authority, it would be hard to fix that character. Judge Hale, indeed, observes, Pleas of the Crown, Cap. 14, p. 134, that it was ruled by all the judges of the Old Bailey, anno 1668, not to be high treason to break prison to deliver forcibly particular persons, unless imprisoned for treason, but only a great riot; and that it is only the breaking of prison in order to deliver persons enerally out of prison that is treason.

But the first is explained by the same great author in the same chapter, p. 144 and 145, 35th Eliz. Certain apprentices, sentenced in the Star Chamber for riots, to be set on the pillory and whipped, were committed to prison till execution, divers other apprentices conspire forcibly to deliver these apprentices; and, accordingly, convened in arms for that purpose, and offered violence to the sheriffs and others who went to resist them.

It was agreed by all the judges, says he, that this was treason within the statute 13th Eliz. for intending to levy war against the Queen; for they held that, if any do levy war for any thing that the Queen, by her laws and justice ought, or may do in government, as Queen, that shall be intended as levying war against the Queen. And it is not material that

they intended no ill to the person of the Queen, since they intended against the office and authority of the Queen to levy war. This is treason within the words and intent of the statute; and hereupon divers were indicted and executed.

This application was easy. The mob intended forcibly to counteract what was done by the Sovereign as such, and thereby to usurp upon the office and authority of his Majesty in the most notorious manner.

This likewise was conform to what the other authors deliver on the same subject, that where a number of men attempt, by force, to remove a public nuisance, real or pretended, they are said to levy war against the King, by attempting to do that by private authority, which he by public justice ought to do. Hale's Pleas of the Crown, L. I, cap. 17, sect. 25.

It was pled, in the second place, for the Crown, That, where a criminal fact is punishable by several laws, it is in the power of the prosecutor to lay the indictment on either of them; and, consequently, that the matter charged in the libel, being certainly murder, it was duly charged as such, though it might possibly be tried as high treason; and for this some authorities from the civil law and doctors were quoted.

But this answer seemed likewise insufficient; for, where the facts wherewith a person is chargeable amount to high treason, they must be tried according to the laws in that behalf, and the course of pro-

ceedings in such cases in England is made the rule with us. The form of procedure is different from that in other crimes; and as there are divers specialties justly introduced in favour of the public for the safety of the commonwealth, so there are certain privileges established in favour of the subject by those laws, particularly as to the limitation of time within which an indictment for treason must be raised, or otherwise the guilt is abolished. Gal. III. cap.

Now, according to the argument pled for the Crown, the greatest confusion would ensue. When the crime is abolished as to the highest effect, it might be still prosecuted under another character; and by the same rule, if one were absolved from the guilt of the crime, upon an indictment for treason, he might be still tried for the same fact, charged in a different manner. Or, if he was absolved from an indictment for a treasonable fact, in the form of a common prosecution not laid as treason, but as a crime of common nature, he might still be in hazard of being of new accused of the same, charged as treason.

It was no doubt for the interest of the public, that the laws which relate to high treason, the proceedings thereon, as to the nature of the crime, the method of prosecution and trial, and the forfeitures and punishments for that offence, were introduced and ascertained; these being of the greatest concern, both to the Crown and to the subject, could not, it would seem, be broke through

by charging the criminal facts under the character of other crimes and offences; and, therefore, the regulations concerning such crimes, of the highest importance, must be punctually observed.

As this seemed plain, from the nature and reason of things, so it could not admit of a doubt with us, even before the statute 7mo Annæ, cap. 21, which makes the laws in England that concern treason to become ours. For example. Theft in landed men was formerly punishable as treason with us, and, consequently, the prosecution behoved to be before the Justiciary. Now, put the case, that a process of theft against a landed man was raised before an inferior court, as an ordinary theft, the court would not be competent, nor could the pursuer restrict his libel in that manner. Sir George Mackenzie observes this to be the case; and that the Justiciary found accordingly; and much more must this hold, after the foresaid British statute. Tit. Theft, sect. 22.

But, if the Honourable Court should be of opinion that the trial on this indictment could proceed, the counsel for the pannel should plead in his behalf what occurred to them, whether with respect to exceptions against the relevancy, or defences properly so called.

As to the first, it was plain, that the libel does not charge the pannel with having been in the conspiracy. It appeared that these disorderly persons described in the indictment had not only formed their plot, but executed it in a great mea-

sure, before the pannel was said to have been among them, which was not till they had attempted the prison door; wherefore, the pannel not being accused of having been one of the contrivers of this mischievous design, he could only be answerable for what part he should be found to have acted in this scene, and not for the deeds of others; and, consequently, all the alternatives in the libel, which was by far the greatest part, must fall to the ground.

When we look into the libel, after the pannel is brought into the stage, all that is laid against him is, that among the rioters planted on the north side of the prison, as a guard at the prison door, and in divers other places during the tumult, the pannel, armed with a Lochaber-axe, was unlawfully and riotously assembled. This could not found guilt against the pannel of a riot, and much less of those horrid crimes charged in the libel.

It is the opinion of all lawyers, founded in the nature of things, that one's bare presence in a mob or tumult could not infer against him guilt of the offences or misdemeanours committed by them. Curiosity frequently brings the most innocent persons upon the spot, to see what the fray is, and perhaps to quell it, if it be in their power; wherefore, one's being among the number, when it appears he fell in with them accidentally, cannot fix any guilt upon him, unless he was likewise aiding and assisting, or that particular facts of force were

committed by himself; whence his being accessory to the riot must be inferred.

But, in the present case, it was not so much as laid in general, that the pannel was aiding and assisting, nor other particular facts charged on him in the libel, whence his aid or assistance could be interpreted. It is only said, that he was unlawfully assembled with them. Truly, since the assembly was unlawful, all in company were, or at least are presumed to have been unlawfully assembled. But the question was not here about the punishment of unlawfully assembling, but of the heinous outrages committed by them, or some of the persons so assembled.

It was very true, the libel mentions, that the pannel was armed with an offensive weapon, but if it did not appear that he made an unlawful use of such weapon, it could not raise a guilt upon him.

The libel indeed concludes, as every other indictment, that the pannel was art or part in all or some of the crimes libelled, and by statute such libel is relevant; but at the same time this particular of the pannel's unlawfully assembling with the rioters, being charged in the libel as sufficient to subject him to exemplary punishment, he was entitled to the judgment of the Court, whether such circumstance was relevant to infer against him guilt of the crimes libelled?

It was already noticed, that persons might be present with arms in an unlawful assembly, from

a good intention, possibly to assist in quelling the mob, if opportunity offered, and there was no question but in this, as well as in every other tumult, many were innocently present. And, as for the arms, they were lying in all parts of the streets, and any person happening to find them might, without bad intent, have taken them up, and carried along where his curiosity, or any other lawful motive, led him to see the catastrophe; and if he made no bad use of such arms, the having them cannot infer the least presumption of guilt in those circumstances.

Many authorities might be adduced on this head, but we should only touch some few of the greatest note. Thus, Julius Clarus, lib. 5, sect. *Homicidium*, No. 37, *et seq.* distinguishes the several cases where manslaughter is committed in a tumult, and it is unknown who is the actor, or by whom the deadly wound is given. But that which seemed to come full to the present case, was where a number of persons are present, when the murder is designedly and deliberately, on a malicious intent committed, and it is uncertain who gives the mortal wound. There he determines against them all, that they are liable to the pains of death, because the murder was intentionally committed by all, and they are all presumed to be abettors, aiders, and assisters.

But when he subjoins this notable observation, which answers the present case exactly, that it must be adverted, that it clearly appears that all of them

were conspirators, and knew that the homicide was intended to be committed; for that it may happen with respect to the same manslaughter, that it may be said to be committed deliberately as to some, and on a sudden as to others of the same company.

For example, that one having a hatred at a certain person, intends to murder him, and convenes others without discovering to them his intention, and brings them into the place where the person intended to be murdered is, and who accordingly is killed. He determines that those others who were accidentally brought to be present are only subject to an extraordinary punishment, but not to the pains of death, unless their previous consciousness of the intended murder is made out against them, and subjoins, that he has known many examples of that kind.

The next we appeal to is Menochius, Lib. 2, *De Arbitr. Jud. quæst. casu* 362, an author of no small account. He distinguishes likewise the several classes of manslaughter, committed by a multitude. The last is, where more persons, deliberately and designedly, set upon one and kill him, and that he is killed with one wound or stab, but it is uncertain which of them gave it. He determines that none of them shall be liable to the pains of death, unless where, by express statute, endeavour to kill is capitally punishable, as was the case of the civil law, by the express terms of the *Lex Cornelia*, L. 1. Sect. 3, L. 7, ff. *de Leg. Cor. de Sicar.*

For that, otherwise, as to those who gave not the mortal wound, it is only an endeavour to kill, which was nowhere at present subjected to the pains of death. But this could only be understood where no previous conspiracy occurred.

We should only add of foreign authorities Matthæus, who seldom errs on the mild side, he gives it expressly as his opinion, De Crimin. tit. 5, ca. 3, sect. finale, That where one is killed by a multitude, none of them shall suffer the pain of death but such as shall be proven to have been the actors; and he founds it upon the express text of the civil law, L. fin. ff. hoc tit. Si in rixa percussus, homo perierit, ictus unius cujusque in hoc collectorum contemplari oportet.

That this text does not refer precisely to casual tumults, was plain from the words, In hoc collectorum, which import that they were convened of purpose. But it supposes that some of those that were assembled were ignorant of the design of bringing them together. And therefore Matthæus does condemn those authors of cruelty, that doom all to the pain of death, since many of them may be innocently assembled.

This doctrine likewise agrees to what is laid down by our great Sir George Mackenzie, Crim. Tit. Murder, sect. 12. The Civilians, says he, in the case of homicidum perplures commissum, state three questions; the first is where the murder was committed upon the forethought felony, and then that the assisters were indefinitely punishable by

death. The second, where it is not certain, but only suspected, and presumable that it was deliberately committed, and then all may be tortured, and if they deny the design they are all only punishable arbitrarily, because of the uncertainty. The third is, when the murder was certainly committed in rixa or tulzie, and then the committer of the murder is only punishable by death; for which he cites a decision in the case of William Douglas.

Now, on supposition that the pannel's case fell under the first of these questions: It was not relevantly libelled that he unlawfully assembled with rioters, unless it were likewise laid that he was an assister in execution of the crimes committed by them, so that bare presence, though with arms, is not sufficient, in the judgment of that learned author.

And if the pannel's case should come under the second class, viz. that it be supposed uncertain, if there was any premeditated design to kill Mr Porteous, then it was plain, that, unless the defender's putting violent hands to him, or contributing other assistance towards his actual murder were libelled and proved, he could not be found guilty of it; and as to his part it was evident the murder could not have been premeditated.

And it was thought their Lordships' decision, in the case of the Edinburgh mob 1700, and the latter Glasgow one 1725, proceeded on the same principles. Now, though both these were concert-

ed and raised of design to commit the particular acts of violence that they executed, yet their Lordships did not sustain simple presence, though with arms, but aiding and abetting only relevant against any of the persons accused of the crimes committed by those mobs.

This was likewise conform to the law and course of proceedings in England. For even in the case of levying war against the King within the realm, simple presence is not sufficient to found the guilt of high treason; but the verdict must either bear in general, that the person indicted was present, aiding and assisting in the treasonable facts, or some particular acts of force must be found by the Jury to have been committed by the person accused, otherwise he must be acquitted by the judges.

For proof we should only appeal to the forecited trial of Peter Messenger and others for high treason, in tumultuously assembling themselves in Moorfields, under colour of pulling down bawdy-houses. Collect. of State Trials, Vol. II. page 31. April 4, 1668.

On this occasion four several indictments were exhibited, comprehending divers persons under each of them, and the jury returned special verdicts in reference to every particular person; and the judges, on advising those verdicts, passed sentence on some of them for high treason.

But as to Green and Beddal, two of the persons indicted, the words of the observer, who was Lord

Chief Justice Keyling, are, we all agreed, that the verdict was not full enough, as to them, for us to judge it treason in them. Because the verdict only finds they were present, and finds no particular act of force committed by them, and does not find that they were aiding and assisting to the rest; and it is possible one may be present at such a rabble only out of curiosity to see; and whether they were aiding or assisting, is matter of fact, which ought to be expressly found by the jury, and not left to us upon any colourable implication; and accordingly these two were discharged.

In applying the above authorities, the defenders contended, That what the pannel was charged with in the libel of being unlawfully assembled with the rioters, was not relevant, and insisted that the Court might determine, if that circumstance should be found sufficient to infer aiding and assisting, so as to subject him to the ordinary punishment for the crimes libelled.

And that this matter might be still clearer, let us reflect a little upon the respective verdicts of the jury in the case of Green and Beddal aforesaid, whom the judges acquitted.

In the case of Green, the jury found that a great number of persons were assembled at the time and place in the indictment in arms, on pretence of pulling down bawdy-houses; that Beesly led them, and was called their captain; and that they were breaking down houses: That William Green was among them casting up his cap and

hallooing, with a staff in his hand: That whilst he was among them he was knocked down by a party of the King's soldiers that came to suppress them, and then taken.

It was plain that more was found against Green to make him an abettor of the mob, than was here specially libelled against the present pannel, and yet he was acquitted of the charge.

As to the other case of Beddal, the jury found that the day and place mentioned in the indictment, a great number of persons did meet together armed, under a person that called himself their Captain, on pretence of breaking open prisons, and releasing prisoners: That they came so assembling to a place called the New Prison, and broke open the prison door, and set out four prisoners; two for felony, and two for other offences: That some being taken, one die and all die: That Beddal was there, and being pursued by one of the King's soldiers, he called out to the company to face about and not to leave him.

It was plain here, that the outrageous acts done by the mob were found by the jury, and likewise that Beddal was among them, and owned himself one of their accessories, and desired assistance from them against being taken; and notwithstanding, because no criminal act of force was found by the jury against him, he was discharged: But Latimer, who was indicted of the same crime, was condemned as guilty of high treason, because he was found by the jury, not only

to have been among the rioters, but likewise active in breaking the prison.

If the case is thus in trials for high treason, where all accessories are principals, and where the least accession is sustained to infer guilt of the crime, could there be any question as to the crimes charged against this pannel, which were not laid as treason; and which the pursuer contended could not amount to that crime? Is it possible, that in crimes which concern the very being of Government, one's presence, and unlawfully assembling with the riotous tumult, shall not be sufficient to infer guilt; and yet that in lesser crimes, which only touch the conspiring and compassing the death of a private man, and indeed, one under sentence of death, such circumstances can be judged to infer accession?

The pursuer was pleased, for answer, to found upon certain old obsolete statutes, touching convocations and tumults in boroughs, Par. 1457, cap. 77, Par. 1563, cap. 75, and cap. 83, Par. 1606, cap. 17. In all which it was pretended, that simple presence in such tumults subjects the party to the pain of death, and, consequently, it was inferred, that the prisoner's presence, especially with an offensive weapon, in this riotous assembly, was relevant to infer against him a capital punishment.

But the proper meaning and intent of these acts, the first of which is entitled, That no leagues or bands be made within boroughs, or

manrent, seemed to import a confederacy, and all the other acts favour the same way; but indeed, by stretching the sense of them in arbitrary reigns, to the common case of tumults within burgh, several persons were subjected to the pains of death.

This was justly complained of, and declared a grievance in the claim of right at the Revolution, of which one article is, That the causing pursue and forfeit persons on obsolete statutes is contrary to law; and though after this, one instance perhaps or two might be given where these acts were founded on, yet no relevancy was ever sustained on them; for ever since they have been laid aside as against the spirit of the revolution government; and it was hoped the gentlemen for the Crown could have no design to revive them on this occasion.

But secondly, The pursuers have not adverted, that, though all these laws had been in observance with us, even after the Revolution, yet they are virtually repealed by the well known British statute, entitled, An act for preventing tumults and riotous assemblies, and for the more effectual punishing the rioters, 1mo Georgii I. cap. 4.

By this statute, the being present in a riotous assembly, whether in town or country, in any part of Great Britain, does not subject any to the pains of death, unless they continue together to the number of twelve, for one hour after the proclamation thereby directed is read by a Judge or

Magistrate, or forcibly hindered. It was self-evident that tumults, or riotous assemblies, in any royal burgh in Scotland, as well as in a county or shire, and every part of Great Britain, must be governed by this general law; and, consequently, the honourable and learned gentleman's labours in reference to those old statutes are quite lost.

Indeed, from this statute, a fresh argument did occur in favour of the pannel, namely, that bare presence in a riotous assembly, except where the provisos of this statute are observed, cannot subject one to a capital punishment whether he is armed or not, for the statute makes no distinction; so that it was thence demonstratively plain, that one in such case could only be liable for the criminal facts done by himself, and that the deeds of the other rioters could not subject him.

It was pretended by the gentlemen for the Crown, in the next place, that this being a concerted design, and deliberate act of the contrivers, all that joined themselves became accomplices in the murder of Mr Porteous, and the preparatory mischievous steps in order to the executing their design; and, consequently, that the pannel's being found armed among them, was sufficient to fix guilt upon him of the whole crimes perpetrated by his associates, which would not be the case of a riotous assembly, accidentally convening, and of a sudden doing some outrageous injuries; and for this the authority of Lord Chief Justice Hale, in his Pleas of the Crown, page 44, was adduced; wherein the case

of riotous assembly to do any act of violence, that learned Judge affirms, that the offence of one is the offence of all the company.

But this was already obviated in both these cases, formerly quoted from the English precedents, and the two among ourselves. The riotous assembly deliberately contrived and executed their wicked design; and yet only the acts of violence done by the persons accused were sustained to found a sentence against them, and not the deeds of their accomplices.

There is difference, indeed, betwixt a riotous tumult designedly assembling to commit a particular crime, and one accidentally happening, without a previous intention of committing any special offence: That in the first, all present against whom an act of force is found by the jury, are liable to the punishment of the crime, though they did not immediately by themselves perpetrate: but in the other these present, though they are proved to have been active, yet they are only answerable according to the degrees of their criminal activity, and no further.

But in both, unless acts of force are found against the party accused of crimes or misdemeanours, committed by riotous assemblies, he cannot be subjected to the ordinary punishment of such crimes, though he may to a pecuniary fine or imprisonment, for being in an unlawful assembly.

And as to the authority from Judge Hale, it was very plain that he means the case where all the

company conspire to do an unlawful act, and then indeed, as admitted above, all present are liable to the punishment consequent thereon.

But if the pursuer had turned over the leaf, he would have found, in the very next paragraph, the following remarkable words: "If there be many that are present, abetting, aiding, and assisting, though all may, as in the cases before shewn, be guilty of homicide, yet, by different circumstances, some may be guilty of homicide, and not of murder, and others may be guilty of murder." *Vide* the case of Salisbury, the master assaults, with malice prepense; the servant, being ignorant of the malice of his master, takes part with the master, and kills the other. It is manslaughter in the servant, and murder in the master. This decision is exactly conform to the case put by Julius Clarus before noticed.

Indeed, the present pannel's case was remarkably in the most favourable of those classes; for he could not have been guilty of conspiring Mr Porteous's death, since it was pure accident that brought him among the rioters, and their design was far advanced in execution before his appearance at all.

Two circumstances occurred farther, to shew that the defender could not be presumed to have been in the plot: First, he is found in the assembly in his livery clothes, a notable badge of distinction. Now, to be sure, he would have dressed himself in such manner as would best conceal him,

and taken some disguise, if he had any design of engaging himself in that vile enterprise. The criminal actors in that bloody scene took care that they should not be discovered by their habit.

Again, he went home that night without absconding; and though he got warning to fly, would not do it, trusting to his own innocence for protection; and as flight was a strong presumption of guilt, so in this case all the ringleaders and notorious offenders have kept themselves out of the way; wherefore, nothing but a direct proof of the pannel's guilt, from his own acts of violence, could be led against him.

It was alleged for the pannel, in the second place, That though the libel, charging him with the outrageous deeds of this riotous assembly, as his accomplices, were sustained, (as it was hoped never should,) yet such accomplices behoved to be named, as Sir George Mackenzie expressly requires, Tit. Art. and Part, sect. 2, which not being done in this indictment, it was not relevant on that account.

To this it was answered, That all that is meant by that learned author is, that the pannels themselves, charged as art and part, must be specially named, and that it were absurd, and is never practised, to name associates in a criminal libel.

But was it possible to imagine that this great lawyer would put a case that could never be doubted? If a man is indicted, must he not be named? He might as well be supposed to inform his reader,

that the pannel behoved to be libelled against, for sure the libel must always contain the name of the person accused.

The meaning, therefore, could only be, that where a person is accused for deeds done by others as his accomplices, these persons must be named and described in the libel, and a proof brought that they were his accomplices, by entering into a previous concert or conspiracy with him to commit the crime.

If it were otherwise, how was it possible to fix guilt on the pannel in a fair way? Should the deed of persons unknown to him, and not mentioned in the indictment, and with respect to whom he was not at liberty to exculpate himself, infer a crime against him?

It was, of old, law with us, and was to this day in England, that the reset of a thief could not be pursued till the principal thief is convicted; and sure it were monstrously absurd to suppose, that, with us at this day, an indictment for reset of a thief could be sustained, without libelling and proving the theft committed by the principal actor, as well as the reset by the accessory.

But to sustain such libel were not more absurd, than in the present case to allow criminal facts, said to be done by pretended accomplices, to infer a crime against a person accused, when they are not mentioned in the libel, and much less their conspiracy with him offered to be proven; for sure, unless they had formed a design in conjunction to

murder Mr Porteous, the act of these third parties could not affect the pannel.

In case any part of the libel should be found relevant against the pannel, then the following defences were offered for him: First, That he was *alibi*, not present, nor possibly he could, while most of this dismal scene was acting. That he was in my Lady Wemyss's and John Lamb's till within a quarter of eleven at night. It is justly said in the libel, that Mr Porteous was hanged about eleven; so that he must have been brought into the street, in the hands of the armed and desperate mob, before the pannel accompanied with them; for, to be sure, the procession from the prison to the common place of execution did take more than half an hour, considering the many interruptions mentioned in the libel, and of Mr Porteous's falling and fainting by the way.

Now, when Mr Porteous was got into the hands of that furious assembly he was in effect a dead man, and no doubt, on the least surmise of a rescue thereafter, he would have been knocked dead on the spot without further ceremony. What followed was mere pomp and show; the mob's wantoning in their wickedness in derision of public justice, as the libel truly expresses it. And was it possible that the pannel's dropping in accidentally among them, and using no act of force, could subject him to be guilty of that notorious crime, to which the only finishing stroke was wanting, and

which in effect was already committed before he had entered?

It was possible the pannel found, or got forced into his hands, a Lochaber-axe, and might have gone along with it in the procession, where his unlucky curiosity and impulse of liquor led him; but sure that could not affect him with guilt, since he made no other use of it, than perhaps to assist him in walking, being otherwise not able to stand or walk for drink. Of which more in the second defence.

Indeed, if the defender had come armed into this unlawful assembly, a design of aiding and assisting therein might be inferred; or if he had been at taking in of the guard, or spoiling them of their arms, and on that occasion got himself armed, it might stand hard with him; for that might likewise presume a design of aiding and assisting them.

But sure it would be made appear, that by chance he fell in with them long after disarming the guard. Could his accidentally finding, or taking into his hand, a Lochaber-axe, fix against him accession to such an act of violence, of which he was altogether incapable? The pannel's natural disposition rendered him unfit for such a daring piece of wickedness;—he had neither head nor heart for it. The persons who were to act the finishing part of this bloody scene had got themselves into disguise, and were no doubt prepared, and taken underhand the design. They must have had hearts

void of common humanity, and been hardened in wickedness, as well as heads to lay the scheme, and hands to go through with it.

The pannel's character was quite the reverse; he was never known in his life to do an outrageous act; his understanding was weak, and his natural temper rather simple and soft, than hardy or cruel; and he was disabled from the use of his faculties, such as they were, by the fumes of liquor, as should afterwards appear.

The pursuer was pleased to make light of this defence *alibi*, and to aver that such was never before sustained; for that the defender, coming from the country to the town, between nine and ten that night, might have concerted with the mob that then began to appear at the West Port, from which he behoved to pass in his return from Craigiehall, and might have continued with them for some time, and then repaired to John Lamb's to refresh himself, which was but little distant from the Purses where he was posted; and that a proof of this *alibi* was hardly possible.

But with submission, a more strongly circumstantial defence of this kind was seldom or never heard. It should be distinctly proved, that the defender came to town before eight at night, when there was not the least appearance of the mob at any of the city gates, or within it. That he came to the house of one M'Intyre's in the West Bow, his fellow servant, where he had left his upper coat in the morning. That, from thence, he repaired to a

house in Miln's Court, where he abode sometime; and thereafter to one Samuel's, an alehouse under the pillars at the entry to the Parliament Close, and after drinking some there, he went to my Lady Wemyss; whence about half an hour after nine, he arrived at Mr Lamb's, where he was kept till near eleven; and in his way homeward to the Canongate, called at Mr Cassie's, vintner, at the entry to the Parliament Close, and drank with his servant for about a quarter of an hour.

All this should be proved by the respective persons in whose company he was all this time, and unless we could suppose a man to be in two places at once, it was impossible to imagine the pannel was assembled with the mob, while he was in other companies that had no concern with them.

The import of this defence was, that the pannel was none of the original promoters of the mob, nor with them from the beginning, and it was a rule, even in a rebellious insurrection, those who are found not to be with the assembly from the beginning of their rising, but only to have suddenly joined with them on the streets, are guilty of no greater offence than a riot at most, unless they have done acts of violence. Hawkins's Pleas of the Crown, Cap. 17. Sect. 26.

And to this defence being contrary to the libel, that is an old exploded notion, and the objection never sustained by the Court; and, indeed, it were contrary to the rules of law and humanity, to give the prerogative of probation to the pursuer against

a poor pannel, swimming for his life; and, indeed, in this case, the libel does not condescend upon the precise time that the pannel was said to have been seen at the Purses with a party of the mob.

The second defence, to which we are now naturally led, and is already a little opened, is, That the defender was mortally drunk at the time, as is set forth in the entry and immediately above.

Lawyers, on this head, distinguish betwixt drunkenness to stupidity, and one's being a little in drink or flustered with liquor: That where the first is accidental and not of design to commit the crime, it excuses him from the ordinary punishment of death in capital crimes; but where it is either of design, or not to such a degree as deprives the party entirely of his rational will, it is so far from excusing from guilt that it exaggerates the party's case, for drunkenness is a crime of its own nature, and frequently daring enterprises in wickedness are not executed till the party that is to act them is heated with liquor.—Menoch. de Arbit. Jud. quæst. Casu 326. Mathæus in Prolego, cap. 2. sect. final. The text of the law is plain, That drunkenness, if not affected, exeems from the ordinary punishment, L. 11. sect. 2. ff. De Pœnis, L. 6. sect. 7. ff. De re Milit.

The pannel's case was of the first kind, as would appear on the proof. He was going about his lady's affairs when he got drunk, by strolling from one alehouse to another, till he was unwarily overtaken and overpowered; and many are so disposed, that when

they are a little by the head with liquor, still they desire more, till they are intoxicate with stupidity. The pannel acknowledged this to be his infirmity; but as he was naturally mild when sober, he was never outrageous in cups.

It was very true drunkenness had never been sustained by the Court of Justiciary, either to exclude or even to mitigate the punishment of the crime committed in drink, as Sir George Mackenzie observes, Criminals, Tit. Crimes in General, sect. 7. But then he likewise gives it as his opinion, that the privy council should on that account, in some circumstantiate cases, mitigate the punishment, and now, since we have no privy council here to apply to, the Lords, in their sentence, may have consideration of such circumstances, and thereon mitigate the same; and, consequently, a proof ought to be indulged, that the whole might be before them in order to such mitigation.

And, indeed, in most cases of crimes committed by particular persons, the being in drink can be no defence; for to be sure, if the drunkenness did not disable the party from committing the fact, it cannot excuse him from the guilt; because, were it to stupidity, he could not have had address to commit crimes that require art and contrivance, nor strength to perpetrate such, to which bodily vigour is requisite.

But, in the present case, as to one's being carried off into a mob, and impelled to go along with them in the commission of an unlawful or outrageous act, his being overtaken with drink to such a

pitch, that he knows not what he is doing, must excuse him. For, in that case, neither contrivance nor vigour are necessary as to him; he moves with the multitude, not as a voluntary agent, but as a mere machine; others had contrived the villany, and are executing it; all the poor drunken man, reeling and staggering to and fro, does, is to go along, and stand by, or perhaps be supported, till the crime is committed. Was it possible, in such case, to fix guilt, where there could be no criminal will, or rather no will at all, the party not being sensible of what is a-doing, more than a man in sleep, or a madman?

Indeed, by the law of England, drunkenness is not sustained by the Judges as a defence; but still there is a proof allowed of it, when averred for the pannel, that the whole of the matter may be before the jury, who regard the party's circumstances on that account as they see cause. That a proof of drunkenness is allowed is evident from the before mentioned case of Dammaree, for whom it was pled as a defence, that he was accidentally drunk before he fell in with the mob, and a proof was allowed.

The third and last defence moved for the pannel was, that he was forced by the mob to go along with them, when he was about going home. No doubt, a more slender force will impress a man of his weak intellectuals, especially overpowered with liquor to such a degree, that he was not capable of resistance; and, consequently, this defence, in a manner, depends very much upon that immediately before mentioned. So far is it from being incon-

sistent with the same, as the pursuer was pleased to aver; and as to the relevancy of it, the pursuer did not controvert it.

Upon the whole, the pannel wished the ringleaders and authors of this outrageous mob were discovered and subjected to punishment, in order that the public justice of the nation might be vindicated; but, at the same time, he humbly thought, it were miserably hard to make him a victim to atone for those proceedings in which he was no criminal actor. He comforted himself with a sense of his innocence, and the justice of the Court; and was sure, unless some mistake or other should be in the case, nothing would come out in the proof against him that could affect him, and that he could prove the above defences by witnesses whose credit could not be impeached.

In respect whereof, it was hoped it should be found, that the charge in the indictment was unduly laid, since the matter therein charged was high treason, and ought to be tried by the laws that relate to the same; or, if it should be found that the trial might proceed, that the same should be found relevant only with respect to the facts alleged done by the pannel himself, and not as to the alternative of facts done by his accomplices; and as to these, the above defences pleaded for the pannel should be sustained and admitted to probation.

(Signed) AND. M'DOUALL.

ADDITIONAL INFORMATION

FOR

WILLIAM MACLAUCHLANE, Prisoner in the Castle of Edinburgh,

AGAINST

His MAJESTY'S ADVOCATE.

THIS unlucky prisoner having been indicted at the instance of his Majesty's Advocate, as guilty of divers enormous crimes, and the relevancy of the libel against the pannel, and of the pannel's defences against it, having been fully heard by the Honourable Court, they ordered informations to be given in on both sides, in order that this trial might be brought to a final issue with all convenient speed.

They that were by order of the Court appointed Counsel for the pannel were far from being willing, in any shape, to protract or delay this trial, for which reason they have implicitly obeyed their Lordships' orders. But the objections to the libel itself, and the prisoner's defences, being many and various, all of them of very great importance to the poor man's own life, some of them of the utmost

consequence to the nation in general, it was not possible for the gentleman who drew the first information to insist in each of them so fully as he could have wished. It was therefore hoped the Honourable Judges would excuse this additional information, which was offered in supplement of our information only in one point, viz. how far William Maclauchlane, the prisoner, his having been so drunk as to deprive him totally of the use of reason at the time and place when he is said to have committed the barbarous and wicked facts set forth in the indictment against him, could defend him against guilt of any kind, or could extenuate or alleviate his guilt, if he had any?

It was pled for the pannel, and was now insisted on, that the very essence of all crimes consists in the *dolus*, or wicked intention and will to do an action hurtful to society, and prohibited by the laws thereof; or in an intention wickedly to omit any part of one's known duty. This is the proper characteristic of every crime, and distinguishes it from an error or fault, the source of which again is no wicked intention, but negligence, ignorance, or inadvertency.

If it was true, then, that William Maclauchlane, at the time and place when he is said to have committed the facts set forth in the libel, was so drunk as to be totally deprived of the use of his reason, void of discernment between good and evil, having no will or intention of any kind; he has been guilty of no more crime, than if at that time he had

been fatuous or furious, or perpetrated those acts of violence when he was fast asleep.

These principles were so true, and the consequences arising from them so clear and evident, that it might justly be matter of admiration, how they came ever either to be denied or disputed; and the defender believed they had never been so, were it not from some inconveniences that attended them, say the gentlemen on the side of the Crown. This was a dangerous doctrine. If this should be established, a drunk man might do what he would *impune*. A man will hardly ever get drunk, but he will commit outrage; he will pretend to be drunk when he is not so; nay, he will get drunk on purpose. In answer to which, first, *Incommodum non solvit argumentum*. If a doctrine be sufficiently established in law and common sense, the inconveniencies which attend it will never afford sufficient argument against it; and it was believed it would be no less inconvenient to establish the opposite doctrine. Next, for a man that gets drunk on purpose to commit a crime, he is criminal no doubt. No lawyer of any nation ever thought of excusing him, nor would the principles above laid down support any man in doing so. Last of all, no doubt, a wicked fellow may affect mortal drunkenness, but so may he fatuity, madness, or even sleep. But because these things may be made a bad use of, was it ever dreamt of by any body, to reckon mad furious people, or people asleep, criminal for doing any thing? No doubt, if wicked designing criminals affect such a state of mind, in order either to perpe-

trate their villanies *impune*, or to escape their punishment, the Judges must look about them,—must make the stricter inquiry into the truth of the allegeance. But this is all they can well do, and the dread of such an imposition on the one side would have very bad consequences, if any Court should be wrought on, either to hang a madman, or a person who at the time his crimes are said to be committed was equally deprived of the use of his reason.

The prosecutor for the Crown's great abilities and ingenuity furnished him with another set of arguments, which should briefly be noticed one by one.

First, he denied the very first principles laid down here, and maintained, that *dolus* was not always required to constitute a crime, but that many instances could be given, where *lata culpa*, or gross negligence, or ignorance, is punished capitally. The memorialist confessed himself here entirely at a loss; he knew of no such instances in our law, or perhaps in any other, at least of any that hath its foundation in reason and common sense. It was a received maxim in the Roman law, that in civil cases, *lata culpa dolo aequiparatur*, but not in crimes; and no question there is a very great difference in being obliged to repair the damage another man has sustained through your fault or negligence, and being capitally punished for it. Gross negligence or ignorance, where you have the opportunity of knowing, is criminal and punishable in some degree, because the offender has there acted or omitted some thing, by which he knows the society may

receive hurt. But that he is equally guilty with a malicious, wicked, designing criminal, the memorialist could never allow.

The next argument made use of was, that people who commit a crime when they are drunk, are doubly guilty, first in being drunk, and then in committing the crime. That they have some degree of guilt in getting themselves drunk, the memorialist owned. The Legislature has never considered it as a very heinous crime, else they would have affixed some higher punishment to it than a trifling fine. But that they are any ways guilty in doing any thing, after they are in a condition not to know in the least what they are doing, he entirely denied.

Another argument made use of was, that a man that got himself drunk was doing an unlawful thing, and so must be answerable for all its consequences. But this by no means holds. No doubt, whenever we do a thing forbid by law, or that we had no title to do, we are accountable for all the bad consequences that could possibly in nature follow on it, would be very odd doctrine. At that rate, every honest gentleman every time he got drunk, would in the sight of God be a murderer, thief, &c. because it is simply possible, that when he got drunk, he might have done all these villanies. But to come a little nearer: Suppose a man throws a stone over a house, it kills another on the other side of it. No doubt the thrower of the stone was in the wrong, not to inquire if any body was there; but is he guilty of murder? Many more instances might be gi-

ven, but it was needless to multiply them in a matter so clear.

The Civilians have laid it so clearly and distinctly down, that drunkenness alleviates guilt, and excuses from the ordinary punishment, that the prosecutors for the Crown were obliged to have recourse to a distinction between *ebrii* and *ebriosi*; and alleged that people that were very seldom, or perhaps but once drunk in their lives, might be excused, but that people that were habitually so never could; and that if such people did a bad thing when they were drunk, they were more guilty than if they had done it sober, habitual drunkenness being an aggravation of their crime; and cited for this some authorities.

As to which, no doubt, there is such a distinction in nature, but we should differ very widely about the consequences pretended to be drawn from it. Habitual drunkards are always infinitely foolish with regard to themselves; but with regard to others in society with them, they may either be the most innocent or most criminal people whatever. Just according to the different effects that liquor has on different tempers or constitutions, people who have been habitually in a track of doing mischief in their cups, no doubt are very unpardonable if they drink at all, and these are the *ebriosi* that Guill, Mathæus, and the other lawyers condemned so much. But as for people that have for a long time got harmlessly drunk, never in their liquor betrayed any disposition to mischief, such people can never suspect that the thing will ever happen,

or that mankind, or the society they live in, would ever receive hurt by their drinking on throughout their whole lives. Whereas a person that was never drunk is exceeding criminal the first time he gets himself so. he does not know his own temper, when heated with liquor: he sees the dreadful effects it has frequently on others, so as to metamorphose them quite, and is infinitely in the wrong to run so terrible a risk. As to our own law on this point, Sir George Mackenzie declares himself convinced of the reasonableness of this defence, to excuse at least from the ordinary punishment. He says, indeed, he had not seen it sustained as a defence in any of our Courts; but if the memorialist was not mistaken, since his time it had considerable weight both with judges and jury. In Mr Carnegie of Finhaven's case, drunkenness, and having received strong provocation, saved his life.

The English lawyers express themselves very short on this head. The great Sir Matthew Hale says, indeed, that if a man commits a crime when drunk, he shall be punished for it when sober. But then, as there are very different degrees of drunkenness, he certainly does not mean drunkenness to that excess as totally to deprive a man of the use of reason, and leave him no will or intention at all. He speaks of principal actors, and executors of crimes, not of poor drunken men, led in by wicked people, whom they accidentally met in the street, to second their crimes, when they know not either what other people or themselves are going about, and when they are mechanically

following example, or doing bidding. But Lord Chief-Justice Parker sets this matter in a very good light, Damaree's trial nono Annae. He was tried there for high treason, because he had been active in pulling down a meeting-house or two. Then drunkenness was pled in excuse for him. The Lord Chief-Justice, in his charge to the jury, expresses himself as follows: "If a man be guilty of a crime of so great consequence, it is no excuse to him that he is in drink, but he was not so much disordered by drink but he knew what he was about; he could lead them to Drury-lane, tell them that he would have all the meeting-houses down, and used proper words to encourage them." This shews that when the English lawyers use these general expressions about drunkenness not excusing guilt, they do not mean mortal drunkenness, or that which deprives men totally of the use of their reason.

Since we have been mentioning the laws and constitution of that brave and wise people the English, to whom we are now happily united, and whose care for the safety of every individual subject in their life, liberty and fortune can never be sufficiently admired; the memorialist asked leave to wish that some things in their method of trying criminals were adopted in our law, particularly the allowing the proof of a pannel's character, than which nothing could be more reasonable in this case. Then, too, although their lawyers seem in general to lay no great stress on drunkenness, yet the judges always allow a proof of it, let it have its own

weight. The memorialist owned, indeed, something of this kind is now happily introduced into our practice, by allowing pannels proof at large of every circumstance that can exculpate them or alleviate their guilt; this has been done in several cases. There is none sure calls more for it than this one. The memorialist should only, among the many instances where this has been done, single but one, viz. The trial of a great many people, Balk, &c. for the outrageous riot in the town of Stirling: this was about a year ago. Among others, the drawer of this memorial was of counsel for the pursuers, and they were far from thinking the defender's case anyways favourable, for nothing but the providence of Almighty God hindered a good deal of bloodshed there that day, and many gentlemen of note and character to be murdered that never were accused, much less convicted or condemned for any crime whatever.

To conclude all, the memorialist declared his utmost aversion at all mobs and mobbish practices. This mob, in particular, dared to do the worst of things, and that in the most barbarous cruel manner, trampled on his most sacred Majesty's prerogative, and audaciously disappointed the effects of our most gracious Queen's act of mercy and clemency. Were the memorialist convinced of this poor prisoner's guilt, he should scarce have the courage to shew his face for him, even although he should thereby run the risk of displeasing the Honourable Court, who had appointed him of his counsel. But as he was convinced of his innocence, he

must undertake his defence so far as in him lay. The poor man has possibly erred through innate stupidity, through drunkenness; but where is he that is safe from error? He was free of wicked previous intention or forethought malice of any kind; or rather what he did was without thought, will, or intention at all. He, a poor harmless honest creature is met drunk on the street, and forced or decoyed into it, he did not know what, by wicked designing sober villains: his errors perhaps deserved some correction, but not the ignominious death and lasting infamy that others did.

(Signed) JOHN CAMPBELL junior.

Edinburgh, 18th March 1737.

The Lord Strichen, one of the Lords Commissioners of Justiciary, continued the diet at the instance of his Majesty's Advocate against William Maclauchlane, till the morrow at ten o'clock forenoon in this place, and ordained parties, assizers, and witnesses, then to attend, each person under the pain of law.

Curia Justiciaria S. D. N. Regis, tenta in nova Sessionis domo burgi de Edinburgo, decimo nono die mensis Martii 1737, per honorabiles viros, Andream Fletcher de Miltown, Justiciarium Clericum, Dominum Jacobum Mackenzie de Roystoun, Magistrum Davidem Erskine de Dun, Dominum Gilbertum Elliot de Minto, et Magistrum Alexandrum Fraser de Strichen, Commissionarios Justiciariae dict. S. D. N. Regis.

Curia legitime affirmata,

Intran. William Maclauchlane, prisoner in the Castle of Edinburgh, *Pannel*,

Indicted and accused, as in the former sederunt.

The Lord Justice-Clerk and Lords Commissioners of Justiciary having considered the indictment pursued at the instance of Duncan Forbes of Culloden, Esq. his Majesty's Advocate for his Highness' interest, against William Maclauchlane, pan-

nel, with the foregoing debate thereupon, Found, That time and place libelled, a number of people having unlawfully, riotously, and tumultuously, assembled, armed with clubs and other warlike or offensive weapons, to which unlawful convocation, the pannel, William Maclauchlane, armed with a Lochaber-axe, or other offensive weapon, joined himself, or that the said pannel was aiding or assisting in all or any of the facts libelled, or his being art and part thereof, relevant to infer the pains of law; but allowed the pannel to adduce what evidence he could, with respect to his behaviour at the time the foresaid crimes were libelled to have been committed, for taking off the circumstances which should be brought for inferring his being guilty, or art and part of the crimes libelled; and repelled the haill other defences proponed for the pannel, and remitted him and the indictment as found relevant to the knowledge of an assize.

(Signed) AND FLETCHER, *I. P. D.*

The Lord Justice-Clerk and Lords Commissioners of Justiciary continued the diet at the instance of His Majesty's Advocate against William Maclauchlane, pannel, till Monday next, the 21st instant, at seven o'clock forenoon, and ordained parties, assizers, and witnesses, then to attend, each person under the pain of law, and the pannel to be carried to the place from whence he came.

CURIA JUSTICIARIA S. D. N. Regis, tenta in nova Sessionis domo burgi de Edinburgo, vigesimo primo die mensis Martii 1737, per honorabiles viros, ANDREAM FLETCHER de Miltown, Justiciarium Clericum, Dominum JACOBUM MACKENZIE de Roystoun, Magistrum DAVIDEM ERSKINE de Dun, Dominum GILBERTUM ELLIOT de Minto, et Magistrum ALEXANDRUM FRASER de Strichen, Commissionarios Justiciariae dict. S. D. N. Regis.

Curia legitime affirmata,

Intran. WILLIAM MACLAUCHLANE, Prisoner in the Castle of Edinburgh, *Pannel*,

INDICTED and ACCUSED, as in the former sederunt.

Thereafter the Lords proceeded to make choice of the following persons to pass upon the assize of the said William Maclauchlane:

Mr Charles Hope Weir of Craigiehall,
Alexander Cunningham of Bonnington,
Richard Cockburn of Clerkington,
John Yetts, merchant in Edinburgh,
Thomas Blackwood, merchant there,
William Clerk, tailor there,
David Nevey, merchant there,
Thomas Arbuthnot, merchant there,
Alexander Kincaid, bookseller there,
John Ogilvie, skinner there,
Thomas Cleghorn, younger of Firrhill,
William Hamilton, brewer in Edinburgh,

William Bryden, baxter there,
George Reid, merchant there,
Hugh Campbell, merchant there.

The above assize being all lawfully sworn, and no objection of the law in the contrair,

Norman Macleod of that Ilk, and Archibald Macaulay, late Provost of Edinburgh, fined and amerciate each of them in the sum of 100 merks, for not appearing this day and place to pass upon the assize of William Maclauchlane, pannel, as they who were lawfully cited for that effect, and ordained them to pay their said fines to the clerk of Court, to be disposed of as the Court should direct.

The pursuer, for proving the libel, adduced the witnesses after deponing, viz.

PATRICK WEIR, shoemaker and drummer in Portsburgh, part of the suburbs of Edinburgh, aged forty-six years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogate, deponed, That the time libelled, and about half an hour after nine o'clock at night, a number of persons came riotously and beat open the deponent's door, and called Bougar, give us out the drums; and the deponent having asked them, What they were to do with the drums? they said they were going to sacrifice Captain Porteous; and thereafter, having seized one of the drums, they put it by force about the deponent's son's neck, and forced him to beat the alarm, and dragged him along with them within the port of the Grassmarket, which some time thereafter they shut, commonly called the Westport; which port being thereafter opened about twelve o'clock at night the deponent came in and saw the deceased Captain Porteous hanging upon a dyster's tree, near the place of common execution, and then he was dead. *Causa scientiae patet.* And this was truth, as he should answer to God. And declared he could not write. (Signed) ANDW. FLETCHER.

WILLIAM WEIR, son to Patrick Weir, the immediate preceding witness, aged eighteen years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That the night that Captain Porteous was murdered, and betwixt eight and nine of that night, a number of people came riotously and beat at the door of the deponent's father's house, calling

out, Where is the bougar the drummer? and upon their getting access, and seizing one of the drums, they dragged the deponent along with them, tied the drum about his neck, and forced him to beat along the Grassmarket, down the Cowgate, up Gray's close, down to the Netherbow, and from thence to the Town-guard; and that during all this time, the rioters pushed and threatened the deponent, and tore his neck till the blood came, and thereby compelled him to beat the drum: That the rioters were very numerous, and many of them armed with staves and cudgels. And when the rioters came the length of the Guard, the deponent made his escape and hid the drum; and about twelve o'clock at night, the deponent saw Captain Porteous hanging dead upon a dyster's tree. *Causa scientiæ patet.* And this was the truth, as he should answer to God.

(Signed) WILLIAM WEIR.
AND. FLETCHER.

HENRY ANDERSON, apprentice to Robert Herron, shoemaker in Edinburgh, aged eighteen years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogate, deponed, That the time and place libelled, the deponent being ready to go to bed, having off his coat in his master's house in the Cowgate, he heard a drum beat betwixt nine and ten, and was immediately told that it was a mob to take out Captain Porteous; and by this time the deponent got his coat on and got out to the street, the mob were come to the Cowgate Port; and the deponent having been

stopped by the mob at the foot of Gray's close, was told that they were shutting the Cowgate Port; and the deponent having gone up Gray's close, the mob soon followed him, and he saw a mob at the Netherbow port; and thereafter, the deponent saw the mob go towards and surround the guard-room, and saw the mob thereafter come out of the guard-room, armed with guns and Lochaber-axes, and then heard a shot by a gun: Thereafter the deponent saw some of the mob at the door of the Tolbooth beating at it with forehammers; and some time thereafter saw the Tolbooth-door burning, and saw men armed with guns and Lochaber-axes standing near by the door of the prison; and there he saw a man with a Lochaber-axe, who said that he would not have it, and thereupon threw it upon the deponent's shoulder; and the deponent having offered it to a person that was standing by, who refusing it, the deponent dropt it down upon the ground among his feet, because he would have nothing to do with it; and being afraid of the mob, he went down Beath's wynd, and thereafter having come up Beath's wynd, he tried to pass by the Parses on the north side of the prison; but there perceiving the backs of a row of armed men across the street, whom he was told were drawn up as a company or guard there, he retired again to Beath's wynd, and that the said company was armed, some with staves, others with guns and Lochaber-axes. *Causa scientiæ patet.* And this was the truth, as he should answer to God.

(Signed) HENRY ANDERSON.
AND. FLETCHER.

ROBERT DOBIE, servant to Alexander Peters, wright burgess of Edinburgh, aged twenty-two years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That the time libelled, he did see a number of persons riotously assembled marching down the Cowgate and by the Horse wynd; where meeting with the deponent, they forced and dragged him along with them from the Horse wynd to the College wynd, at which place he stole away from them. Some time thereafter the deponent came up Marline's wynd, and then he saw them, the said mob, about the Tron Church; and soon thereafter saw severals of them armed with guns and Lochaber-axes, which the deponent heard they had taken out of the guard-room, after they had made themselves masters of it. And one of their number having fired his gun, wounded the deponent's brother in the eye, the sight whereof he has lost since. *Causa scientiæ patet.* And this was the truth, as he should answer to God.

(Signed) ROBERT DOBIE.
DA. ERSKINE.

WILLIAM LINDSAY, waiter at the Netherbow port of Edinburgh, aged fifty-two years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That the time libelled he, the deponent, being then a waiter at the Netherbow Port, he saw a number of people riotously assembled, who came that night towards the said port about a quarter

before ten, and called upon the deponent for the keys of the port, which he at that time not having, they sought after the keeper of the keys, and having found him, forced the keys from him, and therewith did lock fast the port; and at this time he heard the mob speaking that their design was upon Captain Porteous; but deponed, After locking the port, as said is, and carrying away the keys, they left no guard behind them on the said port. *Causa scientiæ patet.* And this was truth, as he should answer to God. And deponed, That some of the said mob he observed to be armed with guns, bayonets, and Lochaber-axes. And this was likewise the truth.

(Signed) WILLIAM LINDSAY.
DA. ERSKINE.

JOHN LEARMOND, keeper of the Netherbow Port of Edinburgh, aged seventy years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That the time libelled, the mob that that night was riotously assembled, a part of them came to the Netherbow Port about the hour of ten; and the deponent having the custody of the keys of the Netherbow Port, they came to his house, and forced from him the keys, and therewith did lock fast the said port, and carry the keys away with them. At this time the deponent had the occasion only of seeing a few of them, no more than what filled the stair up to the deponent's house, whom he observed only to be armed with clubs and staves. After their removal

from the said port, he did not observe that they had placed any guard or sentinels there; but thereafter did observe every now and then some of the said mob come down and visit the said port. *Causa scientiæ patet.* And this was the truth, as he should answer to God.

(Signed) JOHN LEARMOND.
DA. ERSKINE.

JAMES NAPIER, serjeant in the city-guard of Edinburgh, aged fifty years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogate, deponed, The time libelled, the deponent was serjeant upon the guard, and being in the guard-room with the guard-soldiers, he was surprised with the mob's attack upon the guard room; at which time the deponent and the guard being surprised, as said is, and not upon their defence, the said mob took possession of the guard-room, and of all the arms therein, both fire-arms, axes, and Lochaber-axes, and halberts; dislodged both the deponent and the whole soldiers. *Causa scientiæ patet.* And this was truth, as he should answer to God.

(Signed) J. NEPER.
DA. ERSKINE.

DOUGALL CAMPBELL, soldier in the city-guard of Edinburgh, aged forty-four years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That at the time libelled, a little before ten at night, the depo-

nent was standing sentinel at the guard-door with a Lochaber-axe in his hand: That there was at that time a great crowd of people going up and down the street, some of them with staves in their hands: That one of them seized the deponent's Lochaber axe, and desired him to part with it; which the deponent being unwilling to do, they struggled about it, but some other of the mob having joined the man who first seized it, they took it from him by force; whereupon the deponent going into the guard-room, a great number of the mob rushed in and seized the soldiers' arms, and turned them out of the guard. *Causa scientiæ patet.* And this was the truth, as he should answer to God. And declared he could not write.

(Signed) JA. MACKENZIE.

WILLIAM TURNER, servant to John Shaw, merchant in Edinburgh, aged twenty one years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That at the time libelled, about ten o'clock at night, the deponent was coming from the Canongate into the town, and when he came to the Netherbow Port he saw a great crowd there, who were shutting the gate; and the deponent desiring them to let him in, they, with some entreaty, opened the wicket and let him in: That some of them were armed with guns, and some of them with Lochaber axes and halberts, and heard them say they were going to put Captain Porteous to death: That the deponent coming up the street,

saw some of the magistrates of the town going up from the head of Mary King's close towards the Purses on the north side of the Tolbooth: That he saw near the said Purses a great crowd of people, who seemed to be set there as a guard cross the street, some of them armed with guns and Lochaber-axes, which guard stopped any who endeavoured to pass the street: That so soon as the said mob saw the magistrates coming they rushed upon them and forced them to retire. Deponed, That he went to the Lawnmarket, where he saw Captain Porteous in the hands of the mob: That when they came near to the head of the Bow, some of them proposed to hang him over a shoemaker's sign-post, but others opposed it, and said, They would carry him to the place where the deed was done: That, accordingly, they carried him down the West Bow, to the west-end of the Cornmarket, the common place of execution, and having stopt there a little, they then dragged him to a litster's tree, on the south side of the street, where they hanged him with a rope about his neck: That when he endeavoured to take hold of the rope in order to save himself, they struck him on the hand with a paddle, or some such instrument, and forced him to quit his hold: That before they had hanged him up, some of them proposed to give him time to pray, which others refused, saying, He should have no longer time than he gave to others: That, according to the best of his judgment, he was hanged a little after eleven at night. *Causa*

scientiæ patet. And this was the truth, as he should answer to God.

(Signed) WILLIAM TURNER.
JA. MACKENZIE.

ANDREW FINLAYSON, waiter at the Westport of Edinburgh, aged twenty-two years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That he was employed as a waiter at the Westport of Edinburgh about the time libelled, and on that night when the mob happened, about eleven o'clock, at the time foresaid, the deponent being upon his post, a great number of people came up to him and called upon him to deliver up the keys of the Port; he told them he had them not, it not being his business to keep them; upon which they called for the key of the wicket from one Robert Adamson, who was also another waiter at the said Port, who delivered up the same to him. Immediately upon this, some of the mob dragged the person who was commonly employed to shut the gates on the Sundays, up to the Port, and ordered him to make them fast; but he was in such a fright that it was not possible for him to do it; upon which, some of their own number nailed up the ports; and this he heard them say they did, that the enemy might not get in upon them and hinder them to execute the design they had at that time to hang Captain Porteous. A little after this, the deponent walked from the Port to Heriot's work bridge, from whence he saw the mob move from the com-

mon place of execution towards a dyer's tree on the south side of the Grassmarket; and in a very little after that, he saw Captain Porteous pulled up by a rope upon the said tree, who endeavouring to save his neck by putting up his hands, received a stroke with a halbert or Lochaber-axe across his breast, upon which they immediately fell down; after this, the deponent could not observe him to stir hand or feet. During all this while the mob had a drum, which they incessantly beat, which hindered him to hear any thing that passed, but he distinctly saw as above, the moon shining at the time; as also they had lighted flambeaux at the place of execution. *Causa scientiæ patet.* And this was the truth, as he should answer to God.

(Signed) And. Finlayson.
Gilb. Elliot.

John Hislop, merchant in Edinburgh, aged fifty years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogate, deponed, That the time libelled the deponent was sent for by the Magistrates of Edinburgh about ten o'clock at night: That he found them in the house of Robert Clerk, vintner: That immediately after he came to them, they came out of the said house into the street, and walked up towards Forrester's Wynd head well, in order, by their authority, to disperse a mob at that time assembled below the said well: That the deponent walked before the Magistrates with a link in his one hand, and a firelock in the other hand, which he found

upon the street: That when the Magistrates approached the said mob, a great many stones were thrown at them, by which it seemed they were turned back, for after the deponent had turned the corner of the prison, and gone towards the door thereof, he observed the Magistrates did not follow him: That when he came the length of the head of Bess Wynd, he observed a crowd about the prison-door, endeavouring to break open the same. At this time the deponent was attacked, and received several strokes, and had some stones thrown at him, upon which he thought it full time to retire, which accordingly he did down Bess Wynd. Deponed, That when he came first out of Clerk's house, as above, he found a Lochaber-axe lying on the street, which he took up, and gave to one of the gentlemen in company with him, whose name he did not now remember. *Causa scientiæ patet.* And this was the truth, as he should answer to God.

(Signed) Jo. Hislop.
Gilb. Elliot.

George Erskine, candlemaker in Edinburgh, aged twenty-six years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That at the time libelled, the deponent, at about eleven o'clock at night, was stopt by a mob, as he endeavoured to enter the mouth of the Parliament close, some of which mob he saw armed either with firelocks or Lochaber-axes; however, at last he got past, and going through the Laigh Council house, when he

came within sight of the prison door, he saw the same burning, and a crowd of people about it, though at that time the flame was in a good measure extinguished. Deponed, That when he was stopt at the entry to the Parliament close, as above, a tall livery man, either in green or blue, he did not know which, with metal buttons, was one of the persons who stopt him. *Causa scientiæ patet.* And this was the truth, as he should answer to God.

(Signed) GEORGE ERSKINE.
GILB. ELLIOT.

JOHN GORDON, barber, and servant to William Hog, barber and wig-maker in Edinburgh, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, *Nihil novit*, and dismissed.

WILLIAM RENTON, merchant in Edinburgh, aged twenty-three years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogate, deponed, That at the time libelled, between nine and ten o'clock at night, the deponent was at the Advocate's Close head, in the Luckenbooths, when he saw a great mob standing across the street, at the north side of the Tolbooth, some of them armed with firelocks and bayonets: That about half an hour thereafter, he saw Captain Porteous in the hands of the mob about the Bowhead well, at least a person in a night gown, whom he believed to be the Captain; but he was at such a distance he could not distinguish his face.

A little after this, he saw the said Captain drawn up upon a dyer's tree in the Grassmarket, the deponent being at the time in Mr Tod's house, in the foot of the Bow. *Causa scientiæ patet.* And this was the truth, as he should answer to God.

(Signed) WILLIAM RENTON.
GILB. ELLIOT.

GEORGE WILSON, indweller and workman in Edinburgh, aged thirty-one years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That time and place libelled, the deponent came about eleven o'clock at night to the Tolbooth-door, where he saw two faggots of broom brought by some of the mob, and with which two faggots, fire was set to the said door until it was burnt, and there the deponent waited till he saw Captain Porteous brought down by the mob, and after that the mob carried him up the Lawnmarket, until they came to Stewart's sign-post, near the Bowhead, over which some of the mob proposed to hang Captain Porteous, but others were against it. After this, the said Captain Porteous was carried up until he came to the Weigh-house, where some of the mob proposed to hang him over the Weigh-house stair, but this proposal was also rejected; and by this time the deponent happened to get pretty near to Captain Porteous; and as the mob was carrying the said Captain Porteous down the Bow, one of the mob, in a woman's dress, knocked the deponent down; and that as they were going alongst

before this, the deponent interceded with the mob to give Captain Porteous some time to pray. The answer made by the mob was, that the said Captain Porteous never prayed for himself, and did not give them time to pray that he had killed, and that he should be damned before he got time to pray. Deponed, That after this, the deponent was run over by a good many of the mob, and that after he had recovered himself, he went down to the Grassmarket, following the said mob; and there he saw a man set up a halbert upon the stone, the common place of execution; and the person who did so was not the pannel; and that the person who did so had a hat upon his head, and a dark coloured coat, and taller than the pannel: That at the above place where the halbert was fixed, there was a good many in arms about Captain Porteous, and which arms the mob kept always until they came to that place, and there they threw them down: That the deponent heard some of the mob cry, Let us carry him hence, for we have a rope for him in another place. Accordingly he was carried to the dyer's tree, where he was hanged; but before his execution, the deponent again interceded to give him some time to pray, he having by this time got again pretty near him, Captain Porteous; but the mob cried out much to the same purpose, as is above mentioned. Deponed, That he saw Captain Porteous deliver to John Carmichael a purse, which he desired him to deliver to his brother, and that he saw the rope put about Captain Porteous's neck, and afterwards drawn up; but he was not drawn

up until they heard that the military were coming from the Canongate, in by the hospital, at the foot of Leith wynd; and that Captain Porteous was three times hung up, and twice let down again. The first time it happened that the rope was not right about his neck, whereupon he was let down, and afterwards hung up, and then let down a second time, upon the mob's observing that he had not something upon his face; then his shirt was hung over his face, and then he was drawn up, upon hearing of the above rumour, and hung there till he was dead. Deponed, That the first time Captain Porteous was hung up, he heard some of the mob make a proposal of cutting his ears out, and others proposed to geld him; and at the last time he was hung up, he saw some of the mob strike him upon the face with a Lochaber-axe; and that during the whole period, from the time the fire was first set to the Tolbooth-door, till the time that Captain Porteous was hung up upon the dyer's tree, the deponent did not remember to have seen William Maclauchlane, pannel. *Causa scientiæ patet.* And this was truth, as he should answer to God.

(Signed) GEORGE WILSON.
ALEX. FRASER.

JOHN CARMICHAEL, merchant in Edinburgh, aged twenty-four years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That time and place libelled, about ten o'clock at night, the

deponent saw a mob endeavouring, with hammers, to break open the Tolbooth-door: That after this, he saw a part of the said mob placed as a guard from the one side of the street to the other, at the upper end of the Luckenbooths; and that having got liberty from the said mob to pass by, under pretence of going to his quarters, he saw the Tolbooth-door burning, and that having gone up to a house in the Lawnmarket, he afterwards heard that Captain Porteous was taken out and carried down to the Grassmarket, whereupon the deponent went down to the said place, and there saw Captain Porteous, with the mob about him, at the place of common execution; from thence he was carried to a dyer's tree, where the deponent saw Captain Porteous, and heard some of the mob cry out to give him time to pray; and that Captain Porteous seeing the deponent, he gave the deponent a purse, which he desired the deponent to give to his, Captain Porteous's brother: That after this, the deponent saw a rope put about Captain Porteous's neck, by which the said Captain Porteous was drawn up upon the said dyer's tree; and upon this the deponent retired a little towards the Cornmarket; but that while the deponent was beside the dyer's tree, he saw a great number of people, and which the deponent did not think were in disguise, but none of them the deponent knew; and that after he was retired, as above, he saw Captain Porteous let down, and a second time hung up; and that the deponent went away after this, and returned about an hour afterwards, and saw Captain

Porteous still hanging upon the said tree, and dead, but that during the whole time he did not observe William Maclauchlane the pannel there. *Causa scientiæ patet.* And this was the truth, as he should answer to God.

(Signed) JOHN CARMICHAEL.
ALEX. FRASER.

JOHN NISBET, writer in Edinburgh, aged twenty-nine years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That time libelled, the deponent, after eleven o'clock at night, hearing a great noise of people coming down the Bow, looked over his window in Orr's land, and under which window the dyster's tree, upon which Captain Porteous was hanged, was fixed; and from thence he saw a multitude of persons with a flambeau, and when they came to the place of common execution, he observed that they had Captain Porteous in their possession, one on each hand of him, and some of them pushing behind him, and observed some of the rioters endeavouring to pull up the stones that had filled the socket into which the tree of the gallows was ordinarily placed, and at the same time observed others endeavouring to pull up the dyster's tree; and soon thereafter heard one of the mob cry out, You had much better hang him over the dyster's tree, than give yourselves so much trouble; and thereupon those who guarded Captain Porteous brought him towards the dyster's tree, being armed with guns and Lochaber-

axes; and thereafter the deponent observed one of the mob to bring a coil of ropes, one end whereof the rioters threw over the dyster's tree, which a party of them, on the east of the said tree, laid hold of in order to be ready to pull him up, while another party to the west of the tree, about ten yards, endeavoured to tie the other end of the rope about his neck; and in the struggle he was brought down to the street and laid upon his back, and they having there fixed the rope about his neck, dragged him thereafter towards the foot of the tree, and then the other party drew him up, and then the deponent observed one of them that pulled him up, being a thin man well set on his joints, and tall, with a blue coat, a lighter coloured waistcoat, a black roller about his neck, a hat, and a dark coloured periwig, take hold of a Lochaber-axe, and gave the deceased Captain Porteous two strokes with it: And that window from whence the deponent was looking was within ten yards of the place where Captain Porteous was hanged: That the deponent did not know any of the persons that were concerned in the doing of it, and did not see the pannel there. *Causa scientiæ patet.* And this was the truth, as he should answer to God.

(Signed) Jo. Nisbet.
And. Fletcher.

George Campbell, wright burgess of Edinburgh, solemnly sworn, purged of malice, partial

counsel, examined and interrogated, deponed, *Nihil novit.*

ROBERT BENNET, mason in Edinburgh, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, *Nihil novit.*

GEORGE GORDON, writer in Edinburgh, and servant to Thomas Butter, keeper of the minute-book, aged twenty years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That time and place libelled, the deponent being in the Grassmarket saw the mob hang the deceased Captain Porteous over a dyster's tree, and when he had hung for some time, he saw some of them pulling at his feet, and saw him laid down again to the ground, but whether he was then dead the deponent did not know: But they drew him up again, and thereafter saw some of them put up their hands to see if he was dead, and heard them call out, He is dead enough I warrant you; and deponed, That he did not know the pannel, nor did not observe him in the Grassmarket that night or any where else. *Causa scientiae patet.* And this was the truth, as he should answer to God.

(Signed) GEO. GORDON.
AND. FLETCHER.

JAMES CADDELL, servant to John Symington, upholsterer in Edinburgh, aged fifteen years or thereby, unmarried, solemnly sworn, purged of

malice, partial counsel, examined and interrogated, deponed, That the time libelled, after the mob was on the street, the deponent came out of his master's house, and observed them then in and about the guard: Thereafter he went up the street, and in the Lawnmarket he met with William Maclauchlane, pannel, whom he knew, and in evidence thereof pointed him out: When he saw him he observed him doing nothing; but observed him have on his shoulder a long pole or staff, but whether it had any iron upon any end of it, or was the weapon called a Lochaber-axe, he did not know. At this time the pannel was all alone, without being mixed with any company, though at the same time he observed several people in the Lawnmarket going backward and forward. The deponent having spoke to the pannel, the pannel returned for answer, that he should go out of his way. At this time he thought the pannel in drink, because he looked raised like: And the time he saw the pannel as said is, it was before the deceased Captain Porteous was brought out of prison. *Causa scientiæ patet.* And this was the truth, as he should answer to God.

(Signed) Jas. Caddell.
Da. Erskine.

Daniel Fraser, residenter in Edinburgh, and ale-seller in Bailie Fyfe's close, aged thirty years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogate, depones, That the time libelled the deponent

being upon the streets, while the mob was employed in forcing open the prison-door, he observed a part of them standing across the streets and in a rank, and near to them, but not in the rank, he observed William Maclauchlane, pannel, standing with a staff in his hand, but observed him to do nothing, nor heard him speak any thing, and the staff he observed in his hand, he believed to be his ordinary footman staff. · *Causa scientiæ patet.* And this was the truth, as he should answer to God.

(Signed) DANIEL FRASER.
DA. ERSKINE.

THOMAS FULLARTON, servant to Thomas Weir, vintner in Mary King's close, in Edinburgh, aged twenty years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogate, deponed, That the time libelled when the mob was about the prison-door, in order to force it open, he did see William Maclauchlane, pannel, when the door of the prison was burning, standing at a little distance on the south side of the prison, above the window next the door, with a halbert in his hand, at the same time observed him staggering, not able to stand upon his feet, which he believed to have proceeded from being drunk at the time. Deponed, That he did not observe him doing any thing, or giving any assistance to the mob, but did observe several others, some armed with guns, others with Lochaber axes, about the door and near to the place where the pannel was going backwards and forwards, with-

out doing any thing, to the deponent's observation: The deponent staid there for about a quarter of an hour, and saw the pannel the whole time in the manner and situation as before deponed. *Causa scientiæ patet.* And this was the truth, as he should answer to God. And declared he could not write.

DA. ERSKINE.

ALEXANDER HOPE, indweller in Edinburgh, and sometime servant to Sir Alexander Hope of Kerse, aged eighteen years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogate, deponed, That the time libelled, before Captain Porteous was carried up the street, he saw a great number of people standing on the north side of the street, at the Purses: That severals of them were armed with guns, halberts, and Lochaber-axes: That they stood across from one side of the street to the other, and that they hindered the deponent to pass as he was going up the street: That he saw the pannel there with a halbert in his hand, but that he did not see him doing any thing: That when the Magistrates were come up the length of the close called the Advocate's close, over against the Stinking style, they were hindered to come forward, and stones were thrown: But whether they were intended for the Magistrates or not, he knew not; but they were thrown down the street, towards the place where the Magistrates were, but by whom knew not: That the pannel had a big coat then on, and a cap on his head. Deponed, That some of the mob offered a gun to the de-

ponent, and threatened that if he would not take it he would beat him; and accordingly the deponent did take the gun, but did not keep it above three minutes, and laid it down at a shop door and went away, and that this happened when the Magistrates were forced back as before mentioned. Deponed, That he was in the Lawnmarket at the time when Captain Porteous was carried up, and went to the Grassmarket, where he saw Captain Porteous tossed upon the dyster's tree, during all which time he did not see the pannel. *Causa scientiæ patet.* And this was the truth, as he should answer to God. And declared he could not write.

(Signed) JA. MACKENZIE.

JOHN DAVIDSON, indweller in Edinburgh, son to the deceased George Davidson, flesher in Old Meldrum, in the shire of Aberdeen, aged twenty-one years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogate, deponed, That the time libelled, the deponent was at the south side of the Tolbooth, and when he came there, he saw fire had been set to the Tolbooth-door, and a part of it was burning: That he heard several people beat at the door with forehammers, or other instruments. Deponed, That he saw the pannel, William Maclauchlane, near the window immediately to the west side of the prison-door, with a light in his hand, but could not be positive whether it was flambeaux, link, or what it was: That there was a great crowd there, some of whom were armed with guns, Lochaber-axes, or

halberts. Deponed, That the pannel had a cap on, but did not know what clothes he had on, nor did he see him do any thing: That the mob were talking together, and he amongst the rest, but what he said he could not tell. *Causa scientiæ patet.* And this was the truth, as he should answer to God.

(Signed) JOHN DAVIDSON.
JA. MACKENZIE.

ROBERT MACKINLAY, indweller in Edinburgh, and son to the decea-ed David Mackinlay, waterman there, aged twenty-one years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogate, deponed, That the time libelled, the deponent saw a great crowd of people on the north side of the Tolbooth, near the Purses, and that there was severals of them armed with guns, Lochaber-axes, and halberts: That they stood across the street from the Tolbooth to the other side of the street, and that they stopped people who were going along: That some of the mob forced the deponent to put a drum about his neck and beat it: That amongst the men who were so armed, as aforesaid, he saw the pannel with a halbert in his hand, but saw him do nothing: That he appeared to be drunk and staggering, and not stand still in one place. Deponed, That he saw Captain Porteous, after he was brought out of prison by the mob, near the head of Libberton Wynd: That he saw the pannel, William Maclauchlane, before them in the Lawnmarket, with

a halbert in his hand, and a great mob being betwixt the said Maclauchlane and Captain Porteous: That when the mob carried Captain Porteous to the Cornmarket they made a stand there, and that he saw the pannel there with a hatchet; and being asked how near Captain Porteous was then to the pannel? deponed, There would have been six people between them: And being interrogated, Where he, the deponent, was when Captain Porteous was at the gallow's stone, as aforesaid? deponed, That he, the deponent, was a little above the well at the foot of the Bow. *Causa scientiae patet.* And this was the truth, as he should answer to God. And declared he could not write.

(Signed) JA. MACKENZIE.

Thereafter, the pannel adduced the witnesses, after deponing, for proving his exculpation, *viz.*

JOHN SAMUELL, change-keeper near the Parliament Close, Edinburgh, aged thirty-eight years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogate, deponed, That at the time libelled, and about a quarter after nine o'clock at night, the pannel came into the deponent's cellar, near the Cross, where he staid about a quarter of an hour, called for a bottle of ale and drank a part of it, and then leaned his head to the wall; he appeared to the deponent to be very drunk, for when he went up the stair going to the street again, he stumbled and fell for-

ward. *Causa scientiae patet.* And this was the truth, as he should answer to God.

(Signed) JOHN SAMUELL.
GILB. ELLIOT.

JOHN HUTCHESON, dweller in Edinburgh, late servant of Graham of Gorthy, aged thirty-nine years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogate, deponed, That about a quarter after nine o'clock at night, the time libelled, the deponent saw the pannel in the immediate preceding witness's cellar, and there drank a bottle of ale with him: That the pannel appeared to the deponent to be drunk at the time, and that he saw him stumble, and fall upon the stair as he was going out to the street. *Causa scientiae patet.* And this was the truth, as he should answer to God.

(Signed) JOHN HUTCHESON.
GILB. ELLIOT.

MRS LILLIAS ORME, attending the Countess of Wemyss in Edinburgh, aged twenty years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That at the time libelled, about half an hour after nine at night, the deponent, who was servant to my Lady Wemyss, had an opportunity to see William Maclauchlane, the pannel, in my Lady's house, and talking with him at that time, he appeared to be so drunk that he could not give a reasonable answer, and when he delivered a letter

to the deponent he could not stand, but supported himself upon the wall. *Causa scientiae patet.* And this was truth, as she should answer to God.

(Signed) LILLIAS ORME.
GILB. ELLIOT.

MARGARET FRASER, servant to the Countess of Wemyss, aged twenty years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogate, deponed, *conformis praecedenti* as to the pannel's being drunk at half an hour after nine at night, with this addition, That when he left my Lady Wemyss's house, he went down to Mr Lamb's house, where the deponent saw him before ten that same night. *Causa scientiae patet.* And this was the truth, as she should answer to God. And declared she could not write. (Signed) GILB. ELLIOT.

ELIZABETH ANDERSON, spouse to John Lamb, vintner in Edinburgh, aged forty years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That the time libelled, and about half an hour after nine at night, the pannel came into the deponent's house, where she kept him till the clock struck three-quarters after ten; he appeared to the deponent to be so drunk, not to be able to speak, nor indeed to stand without holding by the table. *Causa scientiae patet.* And this was the truth, as she should answer to God.

(Signed) ELIZ. ANDERSON.
GILB. ELLIOT.

ELIZABETH MACDOUGALL, daughter to the deceased John Macdougall, merchant in Edinburgh, aged fifteen years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, *conformis praecedenti in omnibus. Causa scientiae patet.* And this was truth, as she should answer to God.

(Signed) ELIZ. MACDOUGALL.
GILB. ELLIOT.

AGNES MITCHELL, servant to Robert Mathieson, turner in Edinburgh, aged twenty years or thereby, unmarried, solemnly sworn, purged of malice, partial counsel, examined and interrogate, deponed, That the time libelled, the deponent saw William Maclauchlane, the pannel, at the head of Dunbar's Close, fall twice on the street at eleven o'clock at night, and that she saw a woman, at the head of said close, take a halbert out of his hand, which she run away with, and that the pannel was at the time vastly drunk. *Causa scientiae patet.* And this was the truth, as she should answer to God. And declared she could not write.

(Signed) ALEX. FRASER.

JEAN MITCHELL, spouse to William Maclellan, servant to Thomas Marshall, vintner in Edinburgh, aged twenty-six years or thereby, married, solemnly sworn, purged of malice, partial counsel, examined and interrogated, deponed, That the time libelled, about eleven o'clock at night, the deponent saw William Maclauchlane, the pannel, at the

head of Dunbar's Close, and there coming a great rush and noise from the Tolbooth, the deponent and some others ran down the said close, and the pannel followed them down the said close for refuge, where he fell twice, and after the noise was gone, William Maclauchlan, the pannel, went up the said close, having a halbert the whole time in his hand, and the deponent went up also; and when she came to the head of the close, she saw a woman take the halbert out of the pannel's hand and run away with it; and that the pannel was so mortally drunk that he could not stand alone, and that having once fallen she and some others lifted him up. *Causa scientiae patet.* And this was the truth, as she should answer to God.

(Signed) J. M.
ALEX. FRASER.

The said Lords ordained the assize instantly to inclose in this place, and return their verdict the morrow at twelve o'clock forenoon, and the haill fifteen to be then present, each person under the pain of law, and the pannel to be carried to the place from whence he came.

CURIA JUSTICIARIA S. D. N. Regis, tenta in nova Sessionis domo burgi de Edinburgo, vigesimo secundo die mensis Martii 1737, per honorabiles viros, ANDREAM FLETCHER de Miltown, Justiciarium Clericum, Dominum JACOBUM MACKENZIE de Roystoun, Magistrum DAVIDEM ERSKINE de Dun, Dominum GILBERTUM ELLIOT de Minto, et Magistrum ALEXANDREM FRASER de Strichen, Commissionarios Justiciariae dict. S. D. N. Regis.

Curia legitime affirmata,

Intran. WILLIAM MACLAUCHLANE, prisoner in the Castle of Edinburgh, *Pannel*,

Indicted and accused as in the former sederunts.

The persons who passed upon the assize of the said William Maclauchlane, returned their verdict in presence of the said Lords, whereof the tenor follows:

The above assize having inclosed, and chosen Mr Charles Hope Weir of Craigiehall to be their Chancellor, and William Hamilton, brewer in Edinburgh, to be their clerk, and having considered the indictment at the instance of Duncan Forbes of Culloden, Esq. His Majesty's Advocate for his Highness' interest, against William Maclauchlane, pannel, with the Lord Justice-Clerk and Lords Commissioners of Justiciary, their interlocutor thereupon, and the depositions of the witnesses ad-

duced for proving thereof, and the depositions of the witnesses adduced for proving the pannel's behaviour; they, all in one voice, did find the said William Maclauchlane, pannel, *Not Guilty*. In witness whereof, their said Chancellor and Clerk have subscribed these presents in their names, at Edinburgh, the twenty-first day of March seventeen hundred and thirty-seven years.

CH. HOPE WEIR, *Chancellor.*
WM. HAMILTON *Clerk.*

The Lord Justice-Clerk and Lords Commissioners of Justiciary having considered the foregoing verdict of assize, they, in respect thereof, assoilzied the said William Maclauchlane *simpliciter*, and dismissed him from the bar.

(Signed) AND. FLETCHER, *I. P. D.*

PROCEEDINGS

IN THE TRIAL OF

NICOL MUSCHETT.

CURIA JUSTICIARIA, S. D. N. Regis, tenta in Prætoria Burgi de Edinburgh, vigesimo octavo die mensis Novembris, Millesimo septingentesimo vigesimo, per honorabilis viros Dominos JACOBUM MACKENZIE de Royston, et GULIELMUM CALDERWOOD de Polton, Magistros JACOBUM HAMILTON de Pencaitland, et DAVIDEM ERSKINE de Dun, et Dominum WALTERUM PRINGLE de Newhall, Commissionarios Justiciarii dict. S. D. N. Regis.

Curia legitimè affirmata.

Intran.

NICOL MUSCHETT of Boghall, prisoner in the tolbooth of Edinburgh, INDICTED and ACCUSED as guilty of the crime of murder; more especially the murdering of his own wife, in manner mentioned in the indictment, raised at the instance of his Majesty's Advocate against him thereanent; making mention, That, notwithstanding by the law of God, the laws of nature, and the laws of this and all well-governed realms, the crime of murder, more especially the horrid and barbarous murdering of his own wife, is prohibit and punishable with

the severest pains: Likeas, by the 153d act, 12th Parliament James the Sixth, it is statute and ordained, Seeing that divers exceptions and objections rises upon criminal libels, and parties are frusterat of justice be the alleged irrelevancy thereof, that in time coming all criminal libels shall contain, that the persons complained on are art and part of the crimes libelled, which shall be relevant to accuse him thereof, so that no exception or objection take away that part of the libel in time coming. YET TRUE IT IS, that he was guilty art and part of the foresaid horrid and barbarous crime of murdering his own wife: IN SO FAR AS, upon Monday the 17th of October last, or one or other of the days of the said month, he did, in a most cruel and barbarous manner, under cloud of night, carry Margaret Hall, his spouse, to the King's Park, at Holyroodhouse, and then and there did wilfully and wickedly murder her, by cutting her throat almost quite through, and giving her several other wounds, whereof she died. WHICH BEING FOUND PROVEN, or it being found proven, (that his wife was at the time and place aforesaid murdered, and that he was art and part of that murder, by such facts and circumstances as shall be brought in evidence and proved against him,) by the verdict of an assize, in presence of the Lords Justice-General, Justice-Clerk, and Commissioners of Justiciary, he ought to be punished with the pains of death, and confiscation of his moveables, to the terror of others from committing such an unnatural crime in time coming. *Sic subscribitur*,

RO. DUNDAS.

Pursuers.

Mr Walter Stewart, his Majesty's Solicitor and Advocate-depute.

Mr John Sinclair, his Majesty's Advocate-depute.

Mr Duncan Forbes, } Advocates.
Mr Andrew Lauder, }

The libel being openly read, the said Nicol Muschett craved their Lordships to appoint lawyers for him, and named Mr John Horn, Mr John Elphingston, and Mr Charles Erskine, advocates, to appear for him and plead his defences.

The Lords Commissioners of Justiciary, at the pannel's desire, recommend to and ordain Mr John Horn, Mr John Elphingston, and Mr Charles Erskine, or any two of them, to appear for the pannel against Wednesday next, at twelve o'clock in the forenoon, and plead his defences until the final end of the cause, and continue the Court till that time against him; and ordain assizers and witnesses to attend then, each under the penalty of 200 merks, and the pannel to be carried back to prison.

CURIA JUSTICIARIA, S. D. N. Regis, tenta in Prætorio Burgi de Edinburgh, vigesimo nono die mensis Novembris, Millesimo septingentesimo vigesimo, per honorabiles viros ADAM COCKBURNE de Ormiston, Justiciarium Clericum, Dominum GULIELMUM CALDERWOOD de Polton, Magistros JACOBUM HAMILTON de Pencaitland, et DAVIDEM ERSKINE de Dun, et Dominum WALTERUM PRINGLE de Newhall, Commissionarios Justiciarii dict. S. D. N. Regis.

Curia legitimè affirmata.

Intran.

NICOL MUSCHETT of Boghall, indicted and accused *ut in die præcedenti.*

Pursuers.

Mr Walter Stewart, his Majesty's Solicitor and Advocate-depute.

Mr John Sinclair, his Majesty's Advocate-depute.

Mr Duncan Forbes,
Mr John Forbes,
Mr Andrew Lauder,
} Advocates.

Prolocutors in Defence.

Mr John Horn,
Mr John Elphingston,
Mr Charles Erskine, Advocates.

The libel being again openly read, and the pannel having joined the libel, and the lawyers appearing not having proponed any defence against the relevancy of the libel,

The Lords Justice Clerk and Commissioners of Justiciary, having considered the indictment pursued at the instance of his Majesty's Advocate, for his Highness's interest, against Nicol Muschett of Boghall, pannel, and there being no defences proponed thereagainst, they find the libel, as libelled, relevant to infer the pains of death and confiscation of moveables, and remit him to the knowledge of an assize.

AD. COCKBURNE, *I. P. D.*

The Lords Justice Clerk and Commissioners of Justiciary continue the diet against the said Nicol Muschett of Boghall till Monday next, at nine o'clock, and ordain assizers and witnesses to attend at that time, each under the pain of two hundred merks, and the pannel to be carried back to prison.

LORD ROYSTOUN, *Preses.*

CURIA JUSTICIARIA, S. D. N. Regis, tenta in Prætorio Burgi de Edinburgh, quinto die mensis Decembris, Millesimo septingentesimo vigesimo, per honorabiles viros Dominos JACOBUM MACKENZIE de Roystoun, et GULIELMUM CALDERWOOD de Polton, Magistros JACOBUM HAMILTON de Pencaitland, et DAVIDEM ERSKINE de Dun, et Dominum WALTERUM PRINGLE de Newhall, Commissionarios Justiciarii dict. S. D. N. Regis.

Curia legitimè affirmata.

Intran.

NICOL MUSCHETT of Boghall, indicted and accused *ut in diebus præcedentibus.*

The libel being again openly read, the Lords proceeded to choose the persons after named to pass upon his assize.

Assize.

Archibald M'Aulay of Arncaple.
John Birny of Broomhill.
James Dewar of Vogry.
Robert Pringle of Symington.
Richard Lothian of Belches.
James Laing, late bailie of Edinburgh.
James Newlands, late bailie there.
David Crokat, wright there.
William Lindsay, merchant there.
William Lothian, merchant there.
Thomas Fairholm of Pilton.
John Walker of Newhouse.
Alexander Brown of Multrieshills.
John Anderson of Baxfield.
Edward Penman, goldsmith in Edinburgh.

The assize all lawfully sworn, and no objection in the contrair, the pursuer for probation adduces the pannel's own confession judicially emitted before the Lords and assizers, whereof the tenor follows:

Edinburgh, the 5th day of December 1720 years, in presence of the Lords Commissioners of Justiciary and assizers, Nicol Muschett of Boghall judicially confesses and acknowledges that he is guilty of the crime of murdering his own wife, with which he is charged in the within indictment. *Sic subscribitur,*

NIC. MUSCHETT.
JA. MACKENZIE, *I. P. D.*

The Lords Commissioners of Justiciary ordain the assize to inclose in this place presently, and return their verdict so soon as the same is finished and sealed up, and the hail fifteen to be present, each under the pain of two hundred merks.

Then the Lords, having removed from the Bench to the Little Room, the assizers having finished their verdict, and sealed up the same,—

The Lords Commissioners of Justiciary returned back to the Bench.

Re-intran.

NICOL MUSCHETT of Boghall.

The said day the persons who passed upon the assize of the said Nicol Muschett returned their verdict, in presence of the saids Lords, whereof the tenor follows:—"*Edinburgh, 5th December* 1720. The above assize having inclosed, and unanimously choice Archibald Macaulay of Arncaple to be their chancellor, and Thomas Fairholm of Pilton to be their clerk, and having considered the indictment raised at the instance of his Majesty's Advocate against Nicol Muschett of Boghall, pannel; the Lords Justice-Clerk and Commissioners of Justiciary their interlocutor thereupon, with the pannel's judicial confession adduced for proving thereof;—they all, in one voice, find the pannel Guilty of the barbarous crime of murdering his own wife, in manner mentioned in his indictment. In witness whereof, thir presents are subscribed by our said chancellor and clerk, in our names, date and place foresaid. *Sic subscribitur,*

ARD. MACAULAY, *Chancellor.*
THO. FAIRHOLM, *Clerk.*

The Lords Commissioners of Justiciary continue the pronouncing of sentence upon the foregoing verdict of assize till Thursday next, at two o'clock in the afternoon; and ordain the pannel to be carried back to prison.

LORD ROYSTOUN, *Preses.*

CURIA JUSTICIARIA, S. D. N. Regis, tenta in Prætorio Burgi de Edinburgh, octavo die mensis Decembris, Millesimo septingentesimo vigesimo, per honorabiles viros Dominum JACOBUM MACKENZIE de Roystoun, et GULIELMUM CALDERWOOD de Polton, et Magistros JACOBUM HAMILTON de Pencaitland, et DAVIDEM ERSKINE de Dun, et Dominum WALTERUM PRINGLE de Newhall, Commissionarios Justiciarii dict. S. D. N. Regis.

Curia legitimè affirmata.

Patran.

NICOL MUSCHETT of Boghall,

INDICTED and ACCUSED *ut in die præcedenti.*

The Lords Commissioners of Justiciary, having considered the verdict of assize returned upon the 5th day of December instant, against Nicol Muschett of Boghall, pannel, they, in respect thereof, by the mouth of Alexander Lindsay, dempster of Court, decern and adjudge the said Nicol Muschett to be taken to the Grassmarket of Edinburgh, upon Friday, the 6th day of January next to come, and there, betwixt the hours of two and four o'clock in the afternoon, to be hanged by the neck upon a gibbet until he be dead; and ordain all his moveable goods and gear to be escheat and inbrought to his Majesty's use, which is pronounced for doom. *Sic subscribitur,*

JA. MACKENZIE.
WALTER PRINGLE.
W. CALDERWOOD.
J. HAMILTON.
DA. ERSKINE.

APPENDIX.

No. I.

DECLARATION of NICOL MUSCHETT, before the Magistrates of Edinburgh, and of the two Witnesses who saw the Body of MARGARET HALL, when it was found in the King's Park, taken from the original Precognition.

Edinburgh, 22*d October* 1720.

Sederunt:

Bailie PRESTON. Bailie GRIERSON. Bailie HATHORN.

NICOL MUSCHETT of Boghall, being examined by the Magistrates, judicially acknowledges, That, on Monday last, about 11 o'clock at night, he carried Margaret Hall, his spouse, directly from Barnaby Loyd's, in Canongate, where he had been with her, to the Park, telling her he designed for Duddingstone, and, when they came to the Duke's Walk, he there cutted her throat and her chin, and murdered her, and left her there, and then came the length of the tirles and entry to the said walk, and returned back to see if she were dead, and found her dead, and then returned to his quarters; and he told James Muschett, wigmaker, and Mrs Macadam, that he had been guilty of the murder. And this is truth.

Geo. Preston, Bailie. NI. MUSCHETT.

Edinburgh, 25*th Oct.* 1720.

ISOBELL STIRLING, relict of John Steuart, workman in Abbeyhill, being examined, *ut intus*, judicially declares, That, on Tuesday last, being the 18th instant, about ten of the clock of the day, hearing that there was a woman lying murdered in the Park, the declarant went to the King's Park to see the corpse; and when the declarant came the length of the Duke's Walk, she saw a woman lying dead in the east end of the Walk, in a very dismal posture, having her throat cut into the very neck

bone, and her chin cut, and one of her thumbs almost cut off, and found her to be also cut in the breast in several places, and also in the other hand very barbarously, and found some hair in her hand, but could not distinguish the colour by reason of the blood, and saw an Holland sleeve of a man lying just next to her bloody, having the letter N sewed with green silk therein. And this is truth, and cannot write. Jo. WIGHTMAN, Bailie.

JAMES STEUART, servant to Widow Bortleman, at the Watergate, being examined, *ut intus*, judicially declares, That, on Tuesday last, being the 18th instant, he saw a woman lying with her throat cut, and having other wounds upon her, at the east end of the Duke's Walk, within the King's Park, whom he, Robert Bagham, and others, lifted her from the ground, and put her in a bier, and carried her from thence to the chapel at the Watergate, and delivered the bloody sleeve lying by her to John Kelso, constable in the Abbey, having the letter N sewed with green silk thereon. And this is truth, and cannot write. Jo. WIGHTMAN, Bailie.

No. II.

DECLARATION of NICOL MUSCHETT after he was under Sentence of Death, taken from the Original Holograph of himself, and addressed to the Lords of Justiciary.

MY LORDS,—IN exoneration of my own conscience, and obedience to your Lordships' desire, I have here, as briefly as I can, and as the present composure of my thoughts allows, given you an account of the whole designs and intrigues (to the utmost of my knowledge) were carried on or intended against that poor woman now in eternity; in the free discharge of which I most humbly crave your Lordships' clemency, both in protracting the time, and miti-

gating the pains of my deserved punishment, which I hope, after an ingenuous and free confession, your Lordships will grant, (if in such barbarous cases favours can be expected,) and as to your Lordships' making quest into what I here assert of others, I let your Lordships know I do it in all freedom, without malice against, or regard for any person, as God, the supreme judge, and my own conscience, the greatest witness, are my vouchers, as follows:

Having had the misfortune to marry that woman in less than three weeks acquaintance, by the instigation of one whom I supposed to be my friend, and who did show, as I thought, no small pretences thereof, on September 5th, 1719, I no sooner returned from solemnizing marriage, than I repented, not finding matters in any part answer my expectation. A little while after I purposed to leave her, and improve myself abroad, being bred a surgeon, and in order thereto, I went to the country, and advanced some money, and finding my mother and friends not willing I should expose myself to the dangers of travel, I returned to town, and, notwithstanding of their aversion, I resolved to prosecute my design. But there being an old plea betwixt Burnbank and my father, which I was willing should be taken away before my going off, and among other things, when I narrated him my misfortune in rather choosing to leave the country, than lead my life with a woman whom I had unluckily married, and for whom I had no affection, and he, catching the advantage of me here too, too readily offered me his assistance to be rid of her, viz. by obtaining a divorce against her; and my simplicity, by his subtle insinuations, was very soon prevailed upon rather to enter his measures against her, (who to my good information before, and certain knowledge after marriage, was a bad woman, albeit God forbid I should look on her infirmities as any ground or reason for my so using her,) than to ruin my estate, and disoblige friends. And the method he proposed to do it was, First, having entered into obligements one to another by my giving him

money to carry it on, together with a bill for L. 50 Sterling, which he got for his labour, and by his giving me his obligement, which is at present in James Russel, procurator his custody, not to seek any of the said L. 50 from me till he procured sufficient evidence against her of adultery, and which obligements we both entered into mutually; and that in the house of Mr Jaffray, at the head of the Canongate, where we had stayed all that day concerting wicked measures against the defunct, and he made it his business to provide one John Macgregor, Professor of Languages in the Canongate, who might, after our intoxicating her with drink and liquid laudanum, so that she might sleep, go into her bed and then call witnesses, who were on purpose trysted to a tavern near by; but, notwithstanding of her getting much laudanum, with brandy and sugar, which was given her by Burnbank and Alexander Pennycuik, for present in the Abbey, by way of Stockton drops; and when any other in the company drank, they had also a glass with Stockton, to make the poor creature believe there was no fallacy, which was done in one Bailie Smith's house in the Abbey; she was not so overcome, but of necessity I behoved to bed with her, where I staid till she fell asleep, and immediately when I left her sleeping, Burnbank called Macgregor ——— according to Burnbank's directions, whereupon Macgregor immediately went off, after which I returned to her room and awoke her, who all this time was fast asleep; and she asked why I arose, and what these men, viz. the witnesses wanted, to which Burnbank replied, Madam, out of kindness and sympathy with you, I have brought them to be witnesses to your husband's obliging himself both to be more affectionate, and also to settle an aliment upon you, so that you may be easy whether he leave you or not, and so we left her. But, before any thing of this was put to execution, immediately after my first deserting her, and our concerting so

to debauch her, he caused me write a most opprobrious letter from his mouth, and to make it clink the better, that I was upon my way in leaving her. We dated the letter at Newbottle, of an anterior date to our being in Mr Jaffray's, and which we sent to the deceast by one Walter Weir, cadie in the laigh coffeehouse, to the care of Mrs Thom, mercatrix at the Bowhead, signifying to her, that, on account of her lewd and base practices, I had been obliged to forsake her, and that moment having taken horse for London, she needed never expect to see my face more, nor have any thing of me; which letter was sent to cause her despair of me, that she might the more readily fall into temptation, and be seduced by such as he intended to assault her, (but oh! with what shame and confusion may I rehearse such barbarous cruelties.) After her receiving this letter, she fancied to take a trial in the country with my mother, supposing me quite gone, (but from the time she got the foresaid letter, till about a fortnight thereafter, by Burnbank's direction, I lurked in the foresaid Alexander Pennycuik's house;) and Burnbank hearing of her leaving town, was very careful to stop her, by making her believe he would find me out, and procure all satisfaction she would require; but, notwithstanding, she went off with the carrier, which Burnbank getting notice of, hired one Andrew Shiells, writer, to bring her back, together with himself; and having obtained a warrant from a justice of the peace of Linlithgowshire, who was, I believe, the Laird of Marjorbanks, to apprehend her on suspicion of theft, and having inquired at most public houses on the way, at last found her in Linlithgow, they having travelled all the way under cloud of night, being so eager on the pursuit, and having taken horse at the twopenny customhouse, about eleven o'clock at night; and when they found out her quarters, they pretended not to have known of one another's coming; whereupon Andrew Shiells presented

a baton as a constable, to incarcerate her for theft, whereat Burnbank pretended to be very concerned, that any of his countryman's relations, especially such as she, should be so used, and (according to their designed plot) he bailed her to Edinburgh, and when they came to town he settled her, being on a Saturday night, in one Low's at the back of the wall, where he staid all night with her, and ordered the landlady not to let her want, and gave her some money. But a few days thereafter, she hired a horse and went to my mother's house; and to call her hence, Burnbank dictate a considerable long letter, (which I suppose her father keeps,) promising many fair things, upon which she returned and staid for some days in Thomas Stewart's, merchant in the Grassmarket, who was privately ordered to entertain her civilly, and dissuade her from going to her father, or have communication with any belonging to him, fearing his hellish project at the Abbey should be disappointed by her conversing with any of her friends; and on a Monday night, if I right mind, he carried her to the foresaid Bailie Smyth's house in coach, to perpetrate the said barbarous design by Macgregor, which house was thought fitter for the purpose than either Gilbert Yetts's or one Hermain's in the Abbeyhill, both which Burnbank and I tried on a Sabbath day, by telling we wanted a room for a young gentlewoman,—all which was about the latter end of December 1719. But after we informed our procurator, James Russell, of all we could do, he told us unless we could evidence a tract of conversation betwixt Macgregor and her, we could never make anything of it, whereupon James Muschett and his wife were employed as the fittest, because she did not suppose them to do her any harm, to introduce the said Macgregor to her, which James did by carrying him several times to her room at night, and drinking with her. But when in so doing, I had spent much money both in frequenting Burnbank's company, hiring Macgregor, and sustaining James Muschett and his family, together with my procurator's dis-

couraging me, I turned very remiss in following out that resolution; and by this time finding them turning indifferent unless daily supplied in money, I entirely gave over that thought. But the devil never wanting his own emissaries, immediately after instigate Burnbank to proceed a degree farther, by convincing me of the smallness of such wickedness as to exhibit to her poison, James Muschett being the only proper hand for it, who, when desired, very readily undertook it; and the way to give it was by mixing a sufficient quantity of it with a paper of sugar before he went to her room, and when he had gone to her to call for brandy and sugar, which, so soon as it was brought, he was clandestinely to exchange the sugar when it fell to be her dram, and after she took it to make a pretence to break the glass, whereby several glasses were broken in her quarters, lest what remained in it might do harm to others. But waiting a good while before he could get it conveniently done, he at last got her to take it, which she immediately threw up, and continued for some days after very sick, by purging and vomiting, so that life was not expected for her; and always when he went to give her poison, he would immediately send away one Barbara Hunter, who waited upon her, to his wife, who would detain the said Barbara at some work, so that he might have the more convenience for his design; and so soon as he had given her it, he came to my room all trembling, and said to me, By God, she has got it now. Whereupon he and I went straight to Hugh Campbell's, son-in-law to Burnbank, and not finding Burnbank there, we carried Hugh Campbell with us to the Castle gate, and the porter sent a man who brought him down to us, and we walked a considerable time on the Castle-hill, and Burnbank's advice was to continue the application of it, so that when she was rendered weak with one dose, another might carry her off, which accordingly he did, but not with expected success, and by his sometimes giving it with sugar, she began to suspect, and so soon as the sugar was brought, she would have it herself to put into the brandy, and

when it was granted her, Burnbank, James Muschett, and I, contrived to put a little of the poison in a nutmeg grater, and with pretence of grating the nutmeg, to let the poison fall into the liquor, and he got a grater from Burnbank, which he afterwards gave to Alexander Pennycuik, which was as if it had been burnt with fire, by reason of the corrosive mercury, which Burnbank assured us was far less dangerous to meddle with than arsenic, on account arsenic both swells and colours; and also James Muschett's wife took some of the poison in a bit of paper, and went at night with a design to give her it in brandy, but that night the deceased would take no brandy; whereupon she caused a warm drink of ale, and called for some meal, which, when she had caused her drink, she threw the cup into the ashes on pretence of chasing away a cat, so that she might have occasion to wipe it; and also, James Muschett went one day to Francis Russell, druggist, his shop, and sought a sight of his corrosive mercury to buy some of it, which he said was brought to him in a big pot, and when he saw it exactly like to what he formerly got, he did not take any of it, for he was afraid I was cheating him by giving him arsenic for mercury, and Burnbank, when told thereof, approved of his so doing, and said, people on such enterprises are never too much aware: But after the defunct had got it many times to no purpose, Burnbank again proposed to debauch her, and the said James Muschett was to do it, which he said he could do without any difficulty, for which end Burnbank and he went to Gilbert Yetts's to fix on a convenient room, and finding one for their purpose, wherein James Muschett was to stay under the name of Mr Stewart, a country gentleman, not agreeing with the town air, but not thinking the landlady kind enough, they went straight hence to one Macneil's a gardener, where they found all conveniences they wanted, as a proper room for the witnesses to tarry in, till the said James would give the appointed sign of his being in action, but so soon as

they came and told me, I opposed it; and likewise in March last, when I was under salivation for my ears, Burnbank and the said James Muschett were very careful to cause the deceased believe that I was poxed, to cause her undergo a course, and drink cold water when it came to a height, to dispatch her, which the said James caused her do to the none effect, and he urged her so to take it, even to threatening her with a knife if she refused; and when his causing her drink cold water did not prevail, he again made her take more corrosive mercury, immediately after salivation, and Burnbank advised to give it in warm sack and cinnamon, as a cordial after sickness: And when the said James could not prevail with her to take it so oft as designed, which was one dose after another, viz. of corrosive mercury, till she were carried off, by Burnbank's persuasion, I went to her myself with the said James, (for from the Abbey plot I had not been with her till this time,) and while I was speaking with her lying in bed sick by some of the poison he had given her the preceding day, he mixed some more of it in liquor at our backs, which I caused her take, and this course we continued for some time. But all these failing, Burnbank advised, (who was always the contriver, and James Muschett executioner,) to commit yet more wickedness, viz. (and now it's easy to conjecture that by this time we were entirely given up to scruple at no kind of evil, by our being prevailed upon, James Muschett to put to execution, and I to condescend to whatever measures that man Burnbank proposed, and both were willing to serve me so long as I threw them money,) by his advising James to carry her to Leith some afternoon, and to drink with her till it were very late, and on their way home to drown her in a pond, whereof Burnbank said he knew two on the north side of the south road to Leith, which he and I went on a Sabbath day to see, and were very cautious lest any might see us go off the road; but this proposal James not condescending to, said, if we pleased, he pretending kindness,

would take her to the west country with him on horseback, and have her pad so slackly girded, that he might easily drop her, by checking the horse, in Kirkliston Water, which he was to do after much rain, so that the water might be big enough to take her away, this being mostly the said James's wife's proposal, who was accessory to the very minutest part of the whole conduct, and not a little contributed in advising; but Burnbank, not thinking this proper, advised James to knock her on the head, or throw her into some hole without the town, and immediately thereafter to flee to Paris, which in nowise James would assent to; and a while after that, Burnbank and I discorded so far, that we scarcely spoke together, (which, alas! was too long in doing,) by reason of his keeping up my papers, and thereby our projects were laid aside for a while. But, some time thereafter, the said James Muschett, his wife, and I, concerted to knock her on the head when going down Dickson's Close, late, to her room, which concert we entered latter end of April or beginning of May last, and for their reward they were to have 20 guineas, (which was to be his reward for his right executing any of the foresaid projects,) for which he sought my bill, alleging himself not sure without it, (and before this concert, when, upon the other contrivances, Burnbank would had me granting my bill to James, and to consign it in his hands, which James would not do,) because, he said, he had got a hundred pounds from his brother more than his portion, so that he expected none from any of his friends, and he only depended on that, (his wife being more fond on that hellish design than himself,) whereof he got one guinea in winter, which he gave to Mr James Ure, writer, to give to the kirk-treasurer, and half a guinea to bury his child, with sixteen shillings Sterling to turn his clothes a little, before the fatal accident happened; which particulars he got in part payment of the said 20 guineas, besides sustenance for more than three quarters of a year for himself and family. But, before we did any thing in this project, he and I went,

about ten o'clock in the morning, some time in May last, to Mr Malcom's, at the head of the Canongate, and ordered his wife to follow, but, not finding that house convenient, so soon as we saw through a window his wife coming, we went out, and took her to the foresaid Mr Jaffray's, leaving her child with her, and we were set in a room immediately off the kitchen, where we deeply conjured ourselves never to discover the plot; after which she and her child went off, and he and I tarried a little longer. And the measures we laid down were, that his wife was to detain the deceased in the said James Muschett's room till about 11 or 12 o'clock at night, by affording her meat and drink, and entertaining her with flattering discourse, and, in the meantime, her husband was to wait from 10 o'clock at the head of the foresaid close, or immediately within the Netherbow, (the said James's room being at the head of St Mary Wynd,) so that he might not miss her going at the particular hour he had appointed his wife to keep her, from his room to her own; but we did not know how to get an instrument, to get which he went to Robert Sandes's, wright in Moultrieshill, to see if he could take away any of his hammers, and when he had waited so for some days, not getting any of them, his wife, about the 25th of May last, says, "I was last day in Mrs Decroe's, where I saw the head of a hammer lying loose," which Mrs Decroe then lived at the head of the Canongate, but it was objected to her, "What if it be got notice of that you took it?" "No," says she, "the woman is just now to remove from that house, and she will never miss it," and next day she went and brought it; and for a shaft to it, James and I went to the foresaid Robert Sandes's, and got a piece of timber, which James fitted for the head that same night, and next day he coming to my room, shewed me his hands, how they were blistered by handling the knife whitting the timber, and in that end of the shaft which was in the head, there was a nail loosely fixed to keep on the head, which nail, immediately after action, he was to draw, and throw away the head,

and carry home the shaft and burn it; and, to get the design accomplished, he and his wife were very careful for a good while in observing all the foresaid proposals, always making it their business to invite her to their room, and that never sooner than eight o'clock at night, lest she, coming too soon, might weary, and to keep her as late as possible; but always when he followed her to give her the stroke in the dark close, somebody going up or down prevented it. And sometime in harvest last, when the defunct went to the country, the said James running in debt with his landlord, said he could not do any thing (though she were in town) till he got his landlord satisfied, so that he might freely detain her at night, whereupon I gave him two twenty shilling notes, wherewith he paid him, and shortly after he went to Mountainhall, where the deceased was, and entreated her to return to town, in order to accomplish our plot; and when she came, which was some time after, she was invited by them as formerly, he and his wife always saying to me, We wish to God this were over, that we might settle some way ere winter came on. And one time when they were scarce of money, having nothing but what I gave them from time to time, and also I having very little, desired them to give over doing any farther in that plot, to which his wife said, "Is it reasonable, think you, so to do? when my husband and I have wared so much time and pains thereupon, and in expectation of our reward, now to give it over?" But the deceased wearied to stay so often and so long with them, whereupon they told me, unless I would go to her myself, it was not in their power to keep her so late, which accordingly I did the beginning of the week before that barbarity happened, and kept her till about eleven, and sometimes twelve o'clock at night, and James waiting her, was always some way or other disappointed; and, by our detaining her some nights successively, James Muschett's landlord would not suffer her to stay in his house after ten o'clock, and James, by waiting her so late for some

nights, was seized by a violent tooth-ache, which occasioned him to keep his room for two or three days, in which time we contrived to take the poor woman to some part in the Canongate, where we were not acquaint, and while detained her, he might go to his former post; and on Monday, October the 17th, being that fatal day, in the morning, before I went out of my room, I had some occasion for a knife, but what it was I do not mind, having left my own with the deceased the preceding night, and so asked one of my landlady, who gave me, and inquired what was become of mine own? I told her I lost it last night; then she desired me, if I pleased, to make use of hers till I got mine own, which I accepted; at which time I had not the least thought of what fell out, and far less my landlady, who, through the whole course of our hellish contrivances, never so much as knew the least whisper of any of them, so far as my knowledge serves; on account all these our hellish plots were kept up so close, that none knew of them, except Burnbank, James Muschett, his wife, and myself; and that Monday, after dinner, James Muschett and I went down the Canongate, and, meeting with some company, diverted ourselves till about seven o'clock, when he went to carry her to the Canongate, according to our proposal, where I might detain her till he would wait her as formerly in the foresaid close with the hammer, not in the least all this time thinking on what happened; and when he returned to me, (for all the time he was at her, I stayed in the house of one Yeaman, gunsmith, at the head of the Canongate,) without promise of her meeting us that night, he and I went to a back room, and were very angry at her not coming, and immediately we went and sent a cadie for her, and when she came we took her to Mr Loyd's, where, after we had staid a good while, James went off, and I gave him directions, as formerly, at Mr Loyd's stair foot, which accordingly he went to execute. But, oh! that I might dissolve into a flood of tears even in mentioning such bloody crimes,

When she and had I staid a good time after James Muschett went off, the devil, that cunning adversary, suggested to me, being now hardened, and also desperate by all the foresaid plots failing, that it was but a light thing whether he or I were executioner; and I, yielding to the temptation, did, as my indictment bears; and when I returned, thinking James Muschett and his wife would as soon inform of themselves as of me, I called first at them, and told what I had done, but what they said I do not mind, and James went to my room with me, but what my deportment was, or what words past, (my thoughts, after such horrid and unnatural wickedness, being so distracted,) I have entirely forgot.* NI. MUSCHETT.

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* Nicol Muschett, besides this declaration, wrote another and a more full account of his conduct with regard to his wife, which was afterwards published. It is composed in a canting hypocritical style, evidently intended to criminate the unfortunate woman as to gallantry, and to throw the greater part of his own guilt upon his accomplices. He alleges that Margaret Hall enticed him to marry her by sundry meretricious allurements, confessing that a former severe disappointment in love had caused a tumour to arise on her bosom, which she showed to him. The circumstances of the murder he details with great precision. After he and his wife left Lloyd's house, he took the way to the King's Park, pretending that he was going to Duddingstone, and assuring her, that, if she did not accompany him, he would never see her more. The unhappy creature, who seems to have entertained an affection for her husband, in spite of all his barbarous usage, after beseeching him to remain in Edinburgh followed him towards the Park, dissolved in tears, as if conscious of her impending doom. When they had got nearly to the extremity of the path which is called the Duke's Walk, (having been the favourite promenade of the Duke of York, afterwards King James the Seventh,) Muschett, pretending to salute his wife, threw her upon the ground, and proceeded to cut her throat. During her resistance he wounded her hand and her chin, which she held down, thus intercepting the knife. And he declares, that but for her long hair, by which he pinned her to the earth, he could not have perpetrated the crime, her struggles were so very great. To the narrative is subjoined a pious letter, addressed to the wife of his mother, and some elegiac lines worthy of which need only be added, that the cairn or heap of stones on the spot where Muschett perpetrated the murder was removed in the formation of a regular foot-path through the park by Lord Adam Gordon, then ranger of Holyrood.

No. III.

OBLIGATION by JAMES CAMPBELL of Burnbank, to NICOL MUSCHETT, referred to in the foregoing Declaration.

BE it kend till all men by thir present letters, me, James Campbell, Ordnance Storekeeper at Edinburgh Castle: Forasmuch as Nicol Muschett of Boghall is debtor to me in three years rent of his lands, viz. cropt ninty-five, and precedings, and that I have transacted the same for nine hundred merks, Scots money, for which there is bill granted me. Therefore, I hereby declare I am not to demand payment of the said sum until a legal offer be made him of my discharge of all I can claim of him, and give him up, or offer so to do, all his papers on oath: As also, of two legal depositions, or affidavits of two witnesses, of the whorish practices of Margaret Hall, daughter to Adam Hall, merchant in Edinburgh, and three months thereafter. In witness whereof, I have written, with my own hand, on stamped paper, thir presents, at Edinburgh, the twenty-eighth day of November, one thousand seven hundred and nineteen years. JAMES CAMPBELL.

Note.—James Campbell of Burnbank, (well known to all the reprobates in Edinburgh by the familiar appellation of *Beakie*,) was, on the 29th day of March 1721, brought to trial before the High Court of Justiciary, for his concern in the matters related in Nicol Muschett's confession; and the Jury, having found him guilty, art [illegible] part, of the crimes libelled, he was declared infamous [illegible] capable of bearing or enjoying any public office or [illegible] within Scotland, and further banished to his Majes[illegible] [illegible] America during all the days of his life.

[illegible]

[illegible] George Ramsay & Company.

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